

Call for submissions

“Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV”

Background

There are well-documented patterns of human rights violations and negative human rights outcomes resulting from the existence – let alone actual enforcement – of certain criminal laws. In particular, there is substantial evidence of harmful effects to health, equality and human rights arising from the criminalization of sexual and reproductive healthcare services, including abortion; the criminalization of consensual sexual conduct, including consensual sex work, consensual sex outside marriage (e.g. adultery), consensual same-sex relations, and consensual adolescent sexual activity; the criminalization of drug use, or possession of drugs for personal use; and the criminalization of HIV non-disclosure, exposure and transmission (hereinafter “the select areas”).¹

In recent years, national courts, international human rights mechanisms and other independent expert bodies, such as the Global Commission on HIV and the Law, civil society organizations and UN entities have been considering how to address the challenges posed by the misuse of criminal laws in the context of the select areas. Increasingly, they have found criminal law provisions and their enforcement in the context of the select areas to be contrary to human rights law and standards. They have found that, in the context of the select areas, criminal laws actually cause harm, particularly to already marginalized groups, and contravene a number of human rights, including non-discrimination principle; the right to equality before the law and equal protection of the law without discrimination; the right to be free from cruel, inhuman or degrading treatment or punishment; the rights to privacy and to health, to name but a few.

The UN Secretary General, in his report to the 2016 High-Level Meeting on HIV and AIDS, recognized the negative health and human rights impact of criminal law in the following terms:

Misuse of criminal law often negatively impacts health and violates human rights. Overly broad criminalization of HIV exposure, non-disclosure and transmission is contrary to internationally accepted public health recommendations and human rights principles. Criminalization of adult consensual sexual relations is a human rights violation, and legalization can reduce vulnerability to HIV infection and

¹ See, in particular, Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc. A/66/254 (2011), 3 August 2011, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/443/58/PDF/N1144358.pdf?OpenElement>. See also, Global Commission on HIV and the Law, Risks, Rights & Health, Supplement, July 2018, executive summary (<https://hivlawcommission.org/wp-content/uploads/2018/09/HIV-and-the-Law-supplement-FINAL.pdf>) p. 7.

improve treatment access. Decriminalizing possession and use of injecting drugs and developing laws and policies that allow comprehensive harm reduction services have been shown to reduce HIV transmission. Similarly, decriminalization of sex work can reduce violence, harassment and HIV risk. Sex workers should enjoy human rights protections guaranteed to all individuals, including the rights to non-discrimination, health, security and safety.²

In light of this recognition, the Secretary General called on States to:

Leave no one behind and ensure access to services by removing punitive laws, policies and practices that violate human rights, including the criminalization of same-sex sexual relations, gender and sexual orientation diversity, drug use and sex work, the broad criminalization of HIV non-disclosure, exposure and transmission, HIV-related travel restrictions and mandatory testing, age of consent laws that restrict adolescents' right to health care and all forms violence against key populations.³

Last year, in a joint statement on non-discrimination in health care, 12 UN entities recommended that States put in place guarantees against discrimination in laws, policies, and regulations.⁴ In particular, one of the key recommendations addressed to States in that statement calls for:

Reviewing and repealing punitive laws that have been proven to have negative health outcomes and that counter established public health evidence. These include laws that criminalize or otherwise prohibit gender expression, same sex conduct, adultery and other sexual behaviours between consenting adults; adult consensual sex work; drug use or possession of drugs for personal use; sexual and reproductive health care services, including information; and overly broad criminalization of HIV non-disclosure, exposure or transmission.⁵

While some progress has been made in this context,⁶ there is a long way to go. Most countries still criminalize and punish conduct in the context of the select areas to the detriment of the well-being and dignity of the individual and society, particularly in respect to health, equality, and human rights.⁷ There is a need for further strategies and renewed mobilization to address the unjust application and detrimental effects of criminal law, particularly in respect of the above-mentioned areas. This has prompted the Joint United Nations Programme on HIV/AIDS (UNAIDS), the Office of the UN High

² Report of the Secretary-General on the fast track to ending the AIDS epidemic, UN Doc. A/70/811 (2016), paras 53, 75(f).

³ *Id.*, para. 75 (f).

⁴ Joint United Nations statement on ending discrimination in health care settings, 27 June 2017, http://www.unaids.org/sites/default/files/media_asset/ending-discrimination-healthcare-settings_en.pdf, UNAIDS, WHO, OHCHR, UNHCR, UNICEF, WFP, UNDP, UNFPA, UN Women, ILO, UNESCO and IOM.

⁵ *Ibid.*

⁶ "Today more than 89 countries have taken action to repeal or reform laws: some have repealed laws criminalizing HIV, same-sex relations, and drug possession, and others have enacted laws advancing reproductive rights, sex education, and the human rights of people living with or at risk from HIV", Global Commission on HIV and the Law, Risks, Rights & Health, Supplement, July 2018, executive summary, p. 6.

⁷ *Ibid.*, "HIV continues to be a disease of the vulnerable, marginalised and criminalized — gay men and other men who have sex with men, transgender people, people who use drugs, sex workers, prisoners, migrants and the sexual partners of these populations. Key populations and their sexual partners account for 47% of new HIV infections in 2017. Adolescent girls and young women aged 15-24 suffered 20 percent of all new HIV infections", p. 6; and "These marginalised populations, in many places, are under attack by the very governments that are obliged to protect their health and rights. With alarming vigour, many governments are rescinding women's reproductive rights, persecuting LGBT people, sex workers, and people who use drugs, and stifling the civil society groups that provide services, hold governments to account and mobilize calls for justice", *ibid.*, p.11.

Commissioner for Human Rights (OHCHR), the United Nations Development Programme (UNDP), the World Health Organization (WHO), the International Commission of Jurists (ICJ) and others to examine more closely the conditions and the permissible grounds, under applicable international human rights law and standards, for the use of criminal law in the select areas in the first place.

Such efforts are particularly important in the current global context of increased challenges to the international human rights framework and to its application to specific at-risk populations. Civil society organizations, affected communities and other stakeholders have called, in particular, for additional guidance at the international level on the legitimate and illegitimate application of criminal law.

International Discussions on Criminalization

Recognizing the need to re-examine the use of criminal law, UNAIDS, OHCHR, and the ICJ convened a series of meetings focused on the human rights impact of criminal laws in the areas of sexual and reproductive health and rights, consensual sexual conduct, drug use, and HIV exposure, non-disclosure and transmission. These meetings took place in February and March 2017, as well as in May 2018. At these meetings, there was general agreement that there is a need for enhanced, authoritative guidance to address the detrimental impact on health, equality and human rights of criminalization with a focus on the select areas. The guidance could consist, for example, of a set of key principles — elaborated by distinguished jurists,⁸ focusing on conduct pertaining to sexual and reproductive health and rights, consensual sexual conduct, drug use, and HIV exposure, non-disclosure and transmission. International human rights law and standards and foundational principles of criminal law would provide the framework for such set of key principles to help legislatures, the courts, administrative and prosecutorial authorities, and advocates address the detrimental impact on health, equality, and human rights of criminalization, including, in particular, in the context of the select areas. The principles would certainly not be the entire solution to the problem, but one piece in a larger puzzle. They would be elaborated with a view to assisting both in the development of new criminal legislation, and in reviewing existing criminal provisions.

For further background and information on the above discussions, including a record of the discussions themselves, please see the ICJ Report and Annexes, accompanying this call for submissions.

In order to develop a robust set of principles, informed primarily by those who are affected by the existence and enforcement of relevant criminal laws, broad consultation with them and other stakeholders, including those who represent them, is needed.

Civil Society Consultation

As a first step of the broad consultation in the development of principles, the ICJ, in collaboration with UNAIDS, OHCHR, UNDP and WHO, is calling for written submissions. The present call is aimed primarily at key stakeholders within civil society, including non-governmental organizations working on criminal law and human rights, community-based organizations, as well as think tanks, academic experts, representatives of affected communities and other stakeholders.

⁸ Different sets of legal principles, addressing other areas of the law from a human rights perspective, indicate the potential beneficial impact this work could have. For example, legal principles developed by prior colloquia and expert groups related to the application of international human rights law in other contexts, such as the [Siracusa Principles](#), the [Maastricht Principles](#) and the [Yogyakarta Principles](#), in the elaboration of each of which the ICJ played a prominent role, have had a significant impact on the development of national and international jurisprudence.

The written responses received will feed into the development of the principles.

Below, please find some questions to address in your submissions.

Core questions (please address them in your submission):

- What is your interest/ the interest of your organization in this work? What specific issues do you work on in relation to the proposed topics covered?
- In your view, what concepts (human rights, moral/ethical, legal, good governance, harm etc.) are helpful in understanding whether the use of criminal law is justified in the context of the select areas? Are there some areas or conduct that should never be criminalized? On what basis?
- What would your topline recommendations be to States on the use of criminal law in the areas you work in?
- How do you think a set of principles will help support the work you do? How will you use them?

Thematic questions (please feel free to answer some or all or submit an expanded answer on any number of them. If there is something you feel is important to add that is not covered by the questions, please do so):

- Given the scope of this project (the select areas), should any of the conducts in focus be criminalized? If so, which aspects and why? If not, why not?
- What effect do you think criminalizing such conducts can have on the persons whose conduct is criminalized?
- Has criminal law impacted you or your community? If so, how?
- Regarding the issues you work on (please name them), is it clear which conduct is criminalized?
- What do you think these criminal laws are aiming to achieve (what are the goals of criminalizing such conduct?)
- Do you consider the objectives of the criminal law (these objectives typically include the protection of public order, public health or morals or the prevention of harm to others) are being met effectively and fairly in the areas you work in (please note the areas you are referring to)? Why or why not?
- Even if perceived social misconduct is not criminalized, do you still think that there is a need for the State to address it?
- Are there other ways for the State to address perceived social misconduct through legal or other frameworks, aside from criminalization? If so, what are they?
- Can you provide examples of how this is done effectively in the areas you work in?
- Do you feel that the criminal law in the areas you work in has been applied in a proportionate manner? Why or why not?
- Are there particular subgroups of people impacted more by criminal law in areas you work on?
- What is that impact, and how is the impact distinct? Why do you think such subgroups are more affected?

The deadline for submissions is 31 March 2019. Please kindly ensure that your responses do not exceed 5 pages. All submissions, as well as any questions for clarification, should be sent to decrimconsultation@icj.org

Report on the May 2018 Expert Meeting of Jurists: “Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV”

Introduction

1. There are well-documented patterns of human rights violations and adverse human rights effects resulting from the enforcement of criminal law. This includes human rights violations arising from the misuse and abuse of criminal law in the context of the criminalization of sexual and reproductive health and rights, including abortion; consensual sexual conduct, including consensual sex work, consensual sex outside marriage (e.g. adultery), consensual same-sex relations, and consensual adolescent sexual activity; the criminalization of drug use, or possession of drugs for personal use; and the criminalization of HIV non-disclosure, exposure and transmission (hereinafter “the select areas”).⁹

⁹ See, in particular, Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc. A/66/254 (2011), 3 August 2011, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/443/58/PDF/N1144358.pdf?OpenElement>. See also, Global Commission on HIV and the Law, Risks, Rights & Health, Supplement, July 2018, executive summary (<https://hivlawcommission.org/wp-content/uploads/2018/09/HIV-and-the-Law-supplement-FINAL.pdf>), “Criminalisation, discrimination and violence continue to undermine women’s and girls’ ability to protect their health and realise their rights. Sexual and reproductive health and HIV are closely linked. Legal and human rights barriers continue to impede access to sexual and reproductive health services and increase women’s and girls’ vulnerability and risk. Healthcare providers in over 70 jurisdictions have used conscientious objection to deny care to women and girls. The 2017 US “global gag rule” is compounding risk and increasing vulnerability”, p. 7; “Several countries have adopted the “end-demand” model of arresting sex workers’ clients rather than the workers themselves. With the noble intent of ending human trafficking, in 2018 the United States (US) passed legislation allowing legal action against websites that host ads for paid sexual services. Sex workers say that such laws erode their safety, control and earnings. New research concludes that decriminalisation of adult consensual sex work could significantly reduce HIV infection among sex workers”, *ibid*, p. 7; “The war on drugs goes on. Some countries decriminalised possession of small quantities of drugs. Still, depending on the locality, people who use drugs often remain excluded from HIV, TB, and hepatitis treatments, or are subjected to coerced or confined TB treatment. Imprisoned patients are lost to follow up. Mothers who use drugs were especially vulnerable, locked up while pregnant to compel recovery and threatened with loss of child custody if they failed to pursue treatment after birth”, *ibid*, p. 7; and “As of July 2018, 68 countries criminalise HIV non-disclosure, exposure or transmission, or allow the use of HIV status to enhance charges or sentences on conviction. HIV prosecutions have been reported in 69 countries. Belarus, Canada,

2. While some progress has been made in this context,¹⁰ there is a long way to go. Most countries still criminalize and punish conduct to the detriment of the well-being and dignity of the individual and society, particularly in respect to health, equality, and human rights.¹¹ There is a need for further strategies and renewed mobilization to address the unjust application and detrimental effects of criminal law, particularly in respect of the above-mentioned areas. This has prompted UNAIDS,¹² the Office of the UN High Commissioner for Human Rights (OHCHR),¹³ the United Nations Development

Russia and the United States lead in the number of prosecutions. In some countries TB patients have been criminalised for not adhering to and completing treatment”, *ibid*, p. 7.

¹⁰ “Today more than 89 countries have taken action to repeal or reform laws: some have repealed laws criminalizing HIV, same-sex relations, and drug possession, and others have enacted laws advancing reproductive rights, sex education, and the human rights of people living with or at risk from HIV”, *ibid*, p. 6. With respect to the liberalization of abortion laws worldwide, see, for example, Center for Reproductive Rights, “A GLOBAL VIEW OF ABORTION RIGHTS - Between 1950 and 1985, nearly all industrialized countries—and several others—liberalized their abortion laws. In 1994, 179 governments signed the International Conference on Population and Development Programme of Action, signalling their commitment to prevent unsafe abortion. Since this important milestone, more than 30 countries worldwide have liberalized their abortion laws—while only a handful have tightened legal restrictions on abortion” (footnotes in the original omitted, available at http://worldabortionlaws.com/about.html#_edn4).

¹¹ E.g., Global Commission on HIV and the Law, Risks, Rights & Health, Supplement, July 2018, executive summary, “HIV continues to be a disease of the vulnerable, marginalised and criminalized — gay men and other men who have sex with men, transgender people, people who use drugs, sex workers, prisoners, migrants and the sexual partners of these populations. Key populations and their sexual partners account for 47% of new HIV infections in 2017. Adolescent girls and young women aged 15-24 suffered 20 percent of all new HIV infections”, p. 6; and “These marginalised populations, in many places, are under attack by the very governments that are obliged to protect their health and rights. With alarming vigour, many governments are rescinding women’s reproductive rights, persecuting LGBT people, sex workers, and people who use drugs, and stifling the civil society groups that provide services, hold governments to account and mobilize calls for justice”, *ibid*, p.11.

¹² The Joint United Nations Programme on HIV/AIDS (UNAIDS) leads and inspires the world to achieve its shared vision of zero new HIV infections, zero discrimination and zero AIDS-related deaths. UNAIDS unites the efforts of 11 UN organizations—UNHCR, UNICEF, WFP, UNDP, UNFPA, UNODC, UN Women, ILO, UNESCO, WHO and the World Bank—and works closely with global and national partners towards ending the AIDS epidemic by 2030 as part of the Sustainable Development Goals. UNAIDS is a problem-solver. It places people living with HIV and people affected by the virus at the decision-making table and at the centre of designing, delivering and monitoring the AIDS response. It charts paths for countries and communities to get on the Fast-Track to ending AIDS and is a bold advocate for addressing the legal and policy barriers to the AIDS response.

¹³ The mission of the OHCHR is to work for the promotion and protection of all human rights for all people; to help empower people to realize their rights and to assist those responsible for upholding such rights in ensuring that they are implemented. In carrying out its mission OHCHR: gives priority to addressing the most pressing human rights violations, both acute and chronic, particularly those that put life in imminent peril; focuses attention on those who are at risk and vulnerable on multiple fronts; pays equal attention to the realization of civil, cultural, economic, political, and social rights, including the right to development; measures the impact of its work through the substantive benefit that is accrued through it to individuals around the world. OHCHR was established by General Assembly resolution 48/141 of 20 December 1993. It forms part of the UN Secretariat, is guided in its work by the mandate provided by the General Assembly in resolution 48/141, the UN Charter, the Universal Declaration of Human Rights and subsequent human rights instruments, the 1993 Vienna Declaration and Programme of Action, and the 2005 World Summit Outcome Document. Operationally, OHCHR works with governments, legislatures, courts, national institutions, civil society, regional and international organizations, and the UN system to develop and strengthen capacity, particularly at the national level, for the promotion and protection of human rights in accordance with international norms. Institutionally, OHCHR is committed to strengthening the UN human rights programme and to providing it with the highest quality support. OHCHR is committed

Programme (UNDP), the World Health Organization (WHO), the International Commission of Jurists (ICJ)¹⁴ and others to examine more closely the conditions and the permissible grounds, under applicable international human rights law and standards, for the use of criminal law in the select areas in the first place.

3. In this context, the ICJ, with the support of and in collaboration with UNAIDS and OHCHR, convened an Expert Meeting of jurists on decriminalization in Geneva on 3 and 4 May 2018.¹⁵ The present document is the report of that meeting.¹⁶
4. The Meeting focused on the criminalization of sexual and reproductive health and rights, including abortion; consensual sexual conduct, including consensual sex work, consensual sex outside marriage (e.g. adultery), consensual same-sex relations, and consensual adolescent sexual activity; the criminalization of drug use, or possession of drugs for personal use; and the criminalization of HIV non-disclosure, exposure and transmission (hereafter “the select areas”). The expert meeting of leading jurists from around the globe¹⁷ aimed at laying the foundations for the eventual elaboration of a set of principles to address the misuse and abuse of criminal law and its detrimental impact on health, equality, and human rights with particular regard to the select areas.
5. The present document features the following sections:
 - a) Background to the meeting and rationale for elaborating a set of key principles on decriminalization;
 - b) The May 2018 Geneva Expert Meeting of Jurists: “Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV”;
 - c) The Background papers prepared for the meeting;

to working closely with its UN partners to ensure that human rights form the bedrock of the work of the UN.

¹⁴ Established in 1952, and active on five continents, the International Commission of Jurists (ICJ) is an international non-governmental organization headquartered in Geneva, Switzerland. The Commission is composed of 60 distinguished judges and lawyers from all regions of the world, representing different justice systems worldwide. The ICJ promotes understanding and observance of the rule of law and the legal protection of human rights throughout the world. The ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession. It endeavours to promote States’ compliance with their international human rights legal obligations; to support efforts to combat impunity; to ensure legal accountability for human rights violations and access to effective remedies and reparations for victims.

¹⁵ For additional information about the convening, please also see the following statements: <https://www.icj.org/leading-jurists-address-misuse-and-abuse-of-the-criminal-law-and-its-detrimental-impact-on-health-equality-and-human-rights/> and <http://www.unaids.org/en/resources/presscentre/featurestories/2018/may/criminal-laws>.

¹⁶ The writing of this report has been made possible thanks to the generous funding provided by the United Nations Development Programme (UNDP).

¹⁷ See paragraph 15 below.

d) The Jurists' deliberations; and

e) Concrete activities going forward.

a) Background to the meeting and rationale for elaborating a set of key principles on decriminalization

6. In recent years, in the context of the select areas, national courts, international human rights mechanisms and other independent expert bodies, such as the Global Commission on HIV and the Law, civil society organizations and UN entities have increasingly addressed the challenges posed by the misuse of criminal laws in specific contexts, as well as against specific groups.¹⁸ Increasingly, they are finding criminal law provisions and their enforcement to be contrary to human rights law and standards. The application of the criminal law in the context of the select areas has been found to contravene the non-discrimination principle; the right to equality before the law and equal protection of the law without discrimination; the right to be free from cruel, inhuman or degrading treatment or punishment; the rights to privacy and to health, to name but a few.
7. Such efforts are particularly important in the current global context of increased challenges to the international human rights framework and to its application to specific at-risk populations. Civil society organizations, affected communities and other stakeholders have called, in particular, for additional guidance at the international level on the legitimate and illegitimate application of criminal law.
8. The UN Secretary General, in his report to the 2016 High-Level Meeting on HIV and AIDS, recognized the negative health and human rights impact of criminal law in the following terms:

Misuse of criminal law often negatively impacts health and violates human rights. Overly broad criminalization of HIV exposure, non-disclosure and transmission is contrary to internationally accepted public health recommendations and human rights principles. Criminalization of adult consensual sexual relations is a human rights violation, and legalization can reduce vulnerability to HIV infection and improve treatment access. Decriminalizing possession and use of injecting drugs and developing laws and policies that allow comprehensive harm reduction services have been shown to reduce HIV transmission. Similarly, decriminalization

¹⁸ See, for example, the 2012 Risks, Rights & Health report of the Global Commission on HIV and the Law; Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc. A/66/254 (2011), 3 August 2011; Juan E. Mendez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57 (5 January 2016); Report of the UN Working Group on the issue of discrimination against women in law and in practice on women's health and safety, including their rights to reproductive and sexual health, UN Doc. A/HRC/32/44 (2016); Report of the UN Working Group on the issues of discrimination against women in law and in practice, UN Doc. A/HRC/29/40 (2015); Background information on the statement issued by the Working Group on Discrimination against Women to repeal laws criminalizing adultery, (2012); Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the ICESCR), E/C.12/GC/22; and Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 26 July 2017, CEDAW/C/GC/35.

*of sex work can reduce violence, harassment and HIV risk. Sex workers should enjoy human rights protections guaranteed to all individuals, including the rights to non-discrimination, health, security and safety.*¹⁹

9. In light of this recognition, the U.N. Secretary General called on States to:
Leave no one behind and ensure access to services by removing punitive laws, policies and practices that violate human rights, including the criminalization of same-sex sexual relations, gender and sexual orientation diversity, drug use and sex work, the broad criminalization of HIV non-disclosure, exposure and transmission, HIV-related travel restrictions and mandatory testing, age of consent laws that restrict adolescents' right to health care and all forms of violence against key populations.
10. Against this backdrop, in 2017, two expert group meetings were held. The first was co-organized by UNAIDS and OHCHR in Bellagio, Italy, in February 2017 and examined the misuse of criminal law with a focus on abortion, adultery, drug use, HIV transmission, exposure and non-disclosure, same sex relations, and sex work.²⁰ In March 2017, OHCHR convened an additional expert meeting, which considered the appropriate use of criminal law, combining analysis of misuse of criminal law with attention to those situations where human rights advocates have called for the application of criminal law, such as gender-based violence, harmful practices, etc. In light of well-documented abuses,²¹ as well as the increasing recognition of the problem by human rights bodies and existing international, regional and national jurisprudence, both expert meetings recognized that human rights law and standards provide an important framework for examining the criminal law in these areas. Indeed participants at those meetings stressed that universal human rights principles inform and infuse substantive and procedural criminal law, and ensure the proper functioning of criminal justice systems, in particular, within frameworks consistent

¹⁹ *Report of the Secretary-General on the fast track to ending the AIDS epidemic*, UN Doc. A/70/811 (2016), paras 53, 75(f).

²⁰ See, BACKGROUND PAPER 1: Thematic areas, annexed to this report, which, in turn, is based on a paper commissioned by the UNAIDS Secretariat and OHCHR, and provided background information for discussions during the meeting of stakeholders in Bellagio in February 2017.

²¹ See, among others, Dr. Michele R. Decker, SCD, et. al, Human Rights Violations against Sex workers, *The Lancet*, Volume 385, Issue 9963, January 10, 2015; UNDP, *Global Commission on HIV and the Law, Risks, Rights and Health* (2012); [Kora DeBeck, PhD](#), et. al., HIV and the criminalisation of drug use among people who inject drugs: a systematic review, *The Lancet HIV*, Vol. 4 issue 8, PE357-E374, August 01, 2017; Schwartz, S. R., et al., "The immediate effect of the Same-Sex Marriage Prohibition Act on stigma, discrimination, and engagement on HIV prevention and treatment services in men who have sex with men in Nigeria: analysis of prospective data from the TRUST cohort". *The Lancet HIV*, 2(7), e299-e306. 2015; Amnesty International, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador* (2014), <http://www.amnestyusa.org/research/reports/on-the-brink-of-death-violence-against-women-and-the-abortion-ban-in-el-salvador>; Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador's Total Criminalization of Abortion* (2014), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/El-Salvador-CriminalizationOfAbortion-Report.pdf>; Amnesty International, *The Total Abortion Ban in Nicaragua: Women's Health and Lives Endangered, Medical Professionals Criminalized* (2009), <http://www.amnestyusa.org/pdfs/amr430012009en.pdf>; Open Society Foundations, *10 Reasons to Decriminalize Sex Work: A Reference Brief* (2012); see also, Amnesty International's Body Politics: Criminalization of Sexuality and Reproduction series, (<https://www.amnesty.org/en/latest/campaigns/2018/03/un-body-politics-explainer/>), including Amnesty International, Body Politics, the criminalization of sexuality and reproduction, <https://www.amnesty.org/download/Documents/POL4077642018ENGLISH.PDF>; and Amnesty International, A Primer on Criminalization of Sexuality and Reproduction, <https://www.amnesty.org/download/Documents/POL4077632018ENGLISH.PDF>.

with the principles of non-discrimination, equality before the law and equal protection of the law for all without discrimination. In the course of these discussions, an interest was expressed in exploring a process to identify human rights principles that could guide the application of criminal law in these areas. Participants pointed to processes to develop principles in related areas as potential models for such future work.²²

11. In June 2017, UNAIDS and WHO led a joint UN statement on ending discrimination in health care settings signed by 12 UN entities.²³ One of the key recommendations in that statement calls for ‘*Reviewing and repealing punitive laws that have been proven to have negative health outcomes and that counter established public health evidence.*’
12. Moreover, in addition to reiterating the recommendations featured in its 2012 Risks, Rights & Health report,²⁴ in its July 2018 supplemental report,²⁵ the Global Commission on HIV and the Law recommended, as a matter of urgency, the adoption of number of measures that, among other things, would address criminalization in the context of the each of the select areas.²⁶

²² Participants to those meetings identified the ‘Siracusa Principles’, as an example, among others, of principles elaborated by jurists, as relevant, and used them as a reference, as well as the Yogyakarta Principles. See, UN Commission on Human Rights, 41st Sess., 28 September 1984, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, annex. The Siracusa Principles were developed by the American Association for the International Commission of Jurists, and are available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>. The Siracusa Principles lay out the extent to which States can limit and/or derogate from individual human rights to promote the ‘public good.’ They were initially adopted in relation to the International Covenant on Civil and Political Rights (ICCPR), but over time have been applied to analyse State restrictions on rights more broadly. See S Abiola ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant for Civil and Political Rights (ICCPR): History and Interpretation in Public Health Context’ (Research Memorandum Prepared for the Open Society Institute’s Public Health Program Law and Health Initiative) (2011). In 2017, the Yogyakarta Principles were updated; see Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, available at <http://yogyakartaprinciples.org/principles-en/>.

²³ Joint United Nations statement on ending discrimination in health care settings, 27 June 2017, http://www.unaids.org/sites/default/files/media_asset/ending-discrimination-healthcare-settings_en.pdf, UNAIDS, WHO, OHCHR, UNHCR, UNICEF, WFP, UNDP, UNFPA, UN Women, ILO, UNESCO and IOM.

²⁴ “The overarching recommendations of the Global Commission on HIV and the Law are as urgent as ever: Outlaw discrimination and violence against people who are living with and vulnerable to HIV; Repeal laws that control and punish people who are living with and vulnerable to HIV; and Adopt laws and policies that enable effective prevention, treatment, and care and uphold human rights.”

²⁵ The supplement report highlights some of the impacts of HIV criminalization. Particularly, looking at new developments in science such as PrEP and its impact of viral suppression, and the application of the law with regard to HIV criminalisation given these developments, see, <https://hivlawcommission.org/wp-content/uploads/2018/07/HIV-and-the-Law-supplement-FINAL.pdf>.

²⁶ The following are the relevant recommendations featured in the supplemental July 2018 report: “Governments must adopt and enforce laws that protect and promote sexual and reproductive health and rights”; “Governments must remove legal barriers to accessing the full range of sexual and reproductive health services”; “Governments must limit the use of “conscientious objection” in healthcare where the health and lives of others are at risk as a consequence”; “Governments must refrain from adopting laws based on the “end-demand” model of sex work control and repeal such laws where they exist”; “Governments must not pass laws prohibiting, penalising, or enabling legal action against Internet site owners or other media interests that accept advertisements for sex work. If such laws have been adopted, the governments concerned must repeal them”; “Governments

13. Thus, as can be seen from the foregoing, there is both a momentum and a well-founded recognition of the need for authoritative guidance — for example, in the form of a set of key principles — elaborated by distinguished jurists to address the detrimental impact on health, equality and human rights of criminalization with a focus on the select areas. Other sets of similar principles developed by jurists, and addressing other areas of the law from a human rights perspective, indicate the potential beneficial impact this work could have. For example, principles developed by prior colloquia and expert groups related to the application of international human rights law in other contexts, such as the [Siracusa Principles](#), the [Maastricht Principles](#)²⁷ and the 2006 [Yogyakarta Principles](#), in the elaboration of each of which the ICJ played a prominent role,²⁸ have had a significant impact on the development of national and international jurisprudence.
- b) The May 2018 Geneva Expert Meeting of Jurists: “Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV”**
14. Building on the discussions at the two expert meetings organized by OHCHR and UNAIDS in 2017, and against the abovementioned background and momentum, and prompted, in particular, by the continued engagement of affected communities, NGOs, academics, practicing lawyers, etc.²⁹ — some of whom had attended the two 2017 expert meetings — and who have been documenting criminalization’s harmful

must adopt legal protections to prevent discrimination against people who use drugs”; “Governments must prohibit the prosecution—under HIV-specific statutes, drug laws, or child abuse and neglect laws—of women living with HIV for choices they make during and after pregnancy, including about breastfeeding children”; “Governments must take steps to repeal or amend any laws or policies that discriminate against people based on HIV, TB or hepatitis status”; and “In countries where HIV criminalisation laws still exist, courts must require proof, to the applicable criminal law standard, of intent to transmit HIV. The intent to transmit HIV cannot be presumed or derived solely from knowledge on the part of the accused of positive HIV status and/or non-disclosure of that status; from engaging in unprotected sex; by having a baby without taking steps to prevent mother-to-child transmission of HIV; or by sharing drug injection equipment”.

²⁷ The trio standards setting out the parameters of economic, social and cultural rights: 1986 Limburg Principles (on implementation) <https://www.escri-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural>; 1997 Maastricht Guidelines (on violations) http://hrlibrary.umn.edu/instreet/Maastrichtguidelines_.html; 2011 Maastricht Principles (on extraterritorial obligations).

²⁸ Historically, the ICJ has played a major role in the elaboration and adoption of a number of principles by distinguished jurists, including senior judges, legal practitioners, law academics and civil society members. Among those are: the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR; the 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by 40 international law experts from all regions of the world, including current and former members of international human rights treaty bodies, regional human rights bodies, as well as former and current Special Rapporteurs of the UN Human Rights Council; and the 2006 Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity - a universal guide to human rights which affirm binding international legal standards with which all States must comply.

²⁹In this context, Background paper 1: Thematic Areas notes: “In many countries and context, there have been sustained efforts to respond to the misuse of the criminal law and its impact on specific populations. Whether it is through groundbreaking litigation, legislative and policy reform, change in practice and community mobilization, there are common strategies and arguments that are often used in the successful responses to the criminal law.”

impact in the context of the select areas, and advocating for decriminalization,³⁰ on 3 and 4 May 2018, the ICJ—with the support of and in collaboration with UNAIDS and OHCHR—convened an expert meeting of distinguished jurists. The aim of the meeting was not to elaborate already a set of principles, but to identify a broad, normative human rights and substantive criminal law framework for the elaboration of such a set of key principles to help legislatures, the courts, administrative and prosecutorial authorities, and advocates address the detrimental impact on health, equality, and human rights of criminalization, including, in particular, in the context of the select areas. The principles would be elaborated with a view to assisting both in the development of new criminal legislation, and in reviewing existing criminal provisions.

15. The distinguished jurists who attended the meeting were either sitting or retired senior members of the judiciary, and/or currently practising legal practitioners, law academics, former and current UN independent experts, and civil society members, hailing from different countries, representing different legal systems and judicial traditions. They were: Edwin Cameron, Justice of the Constitutional Court of South Africa; Markus Dubber, Director of the Centre for Ethics and Professor of Law at the University of Toronto; Richard Elliott, Executive Director of the Canadian HIV/AIDS Legal Network; Anand Grover, Senior Advocate and the Director of the Lawyers Collective in India; Eszter Kismödi, Acting Chief Executive of Reproductive Health Matters; Monica Mbaru, Judge on the Industrial Court of Kenya; Alice Miller, Associate Professor of Law at Yale Law School and the Co-Director of the Global Health Justice Partnership; Gloria Ortiz Delgado, Justice of the Constitutional Court of Colombia; Ivana Radačić, the Chair of UN Working Group on the Issue of Discrimination against Women in Law and in Practice; and Kalyan Shrestha, Former Chief Justice of Nepal and current Justice of the Supreme Court.³¹

c) The Background papers prepared for the meeting

16. Two papers comprised the substantive background documents for May 2018 expert meeting of jurists.³² The first one, entitled “Background Paper 1: Thematic areas”, provided a general understanding of the various substantive thematic areas to be discussed. It discussed how, despite the variety of their focus, content and scope, criminal laws in the select areas have several commonalities. They are all influenced and justified by common arguments relating to the protection of social order or morality, the

³⁰ Again, Background paper 1 notes: “Regardless of which strategy was used to affect change, recognizing the harm caused by these laws has led to the participation of the most affected communities in the process of law reform and litigation. It has led to the debunking of harmful stereotypes often rooted in religious or moral beliefs and ensuring they do not continue to guide laws and practices, and to recognizing that individual and community experiences are critical to positive change. Relatedly, the scientific evidence base has been an important influencer of change. This is evident in court judgments and legislative adoption processes that have found criminal laws in violation of human rights protections oftentimes-based on evidence.”

³¹ In addition to them, the following individuals participated in the meeting: Ian Askew, WHO Director, Reproductive Health and Research; Luis Mora, UNFPA, Chief, Gender, Human Rights and Culture Branch; Kene Esom, UNDP, Policy Specialist, Human Rights, Law and Gender HIV, Health and Development Group; Mona Rishmawi, OHCHR, Chief, Rule of Law, Equality and Non-Discrimination Branch; Lucinda O’Hanlon, OHCHR, Advisor on Women’s Rights; Zaved Mahmood, OHCHR, Adviser on Drug Policy and Human Rights; Kate Gilmore, OHCHR, Deputy High Commissioner for Human Rights; Veronica Birga, OHCHR, Chief, Women’s Rights and Gender Section; Christina Zampas, UNAIDS, Interim Senior Advisor, Gender Equality; Tim Martineau, UNAIDS, Acting Deputy Executive Director; Patrick Eba, UNAIDS, Senior Human Rights and Law Adviser; Luisa Cabal, UNAIDS, Special Advisor, Human Rights and Gender; Saman Zia-Zarifi, ICJ, Secretary General; Ian Seiderman, ICJ, Legal and Policy Director; and Livio Zilli, ICJ, Senior Legal Adviser.

³² Both papers are annexed to this report.

promotion of religious beliefs or culture, and allegations relating to the protection of the persons involved and third parties. The resort to criminal law in the select areas is often based on negative gender, social and cultural stereotypes and on several interrelated assumptions that raise considerable concern. The paper noted how individuals targeted by criminal law in the context of the select areas belong to groups that are often marginalized, and that are either silenced or ignored when it comes to the development of laws or policies that affect them. Criminal laws have far-reaching, adverse human rights impacts, including exacerbating discrimination, and denying those already marginalized, stigmatized and at-risk populations fundamental human rights relating to control over their bodies and autonomy in choices about their lives. The paper underscored the fact that criminal law enforcement against these groups has also been shown to have serious negative health consequences for the individuals involved and for the public, thus raising further concerns about the reasonableness and other justifications for these laws. The paper also highlighted how human rights principles and protections, which are found in international and regional human rights treaties and in national laws and constitutions, have played a key role in successful decriminalization in the context of the select areas. However, while a range of human rights have been successfully invoked, including the right to non-discrimination and equality, and the right to health,³³ a few human rights protections, which have been particularly successful, address the underlying causes of such harmful laws and practices.

17. The second paper,³⁴ entitled "Background paper No. 2 'Human rights and criminal law principles - Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV'", focused on human rights and substantive criminal law. It explored and sought to outline the principles/notions arising from substantive criminal law and human rights law that inform and underpin the answer to the following fundamental question: what acts or omissions should be criminalized and why? When considering which circumstances justify a criminal law response, the human rights framework assists us in addressing important questions about both the substance of crimes and the procedures to enforce the criminal law: e.g., is this a kind of "harm" by which society is harmed? What are the conditions in which the State is allowed to restrict the enjoyment of some limited range of rights? When it does limit or restrict those rights, has the State acted in a way that is just and fair at all stages? The paper put forward a number of legal questions that were further discussed at the meeting and set out propositions, drawn from international human rights law (IHL) and substantive criminal law expected to form the basis of a set of principles to address the detrimental impact of criminalization, in particular, in the context of the select areas.
18. The paper set out certain key propositions, stressing, in particular, that substantive criminal law and IHL provide critical guidance on what acts or omissions States can legitimately criminalize, on who can legitimately be criminally sanctioned, and on how States can do so. Substantive criminal law, for example, identifies and defines acts and omissions as criminally sanctionable, and determines who – and under what circumstances – may rightly be held criminally liable. The paper underscored that States can enforce criminal law powers that are consistent with, and thus permitted under IHL, so long as such powers are provided for in national law; serve a legitimate aim; and are necessary and proportionate to the aim pursued. The primacy of human rights

³³ The paper further noted how, while not all of the successes have been recognized to encompass these rights, they usually are supported by at least one of these rights, whether it is based on national constitutions or international law protection or both. It is also often recognized that discrimination is a contributing factor to a broad range of other human rights violations, such as those related to violence or to health, for example. The interdependence of rights is increasingly being recognized in these contexts.

³⁴ This paper is also annexed to this report.

rules out the design and implementation of criminal laws inconsistent with human dignity. Criminal laws that are *per se* discriminatory and/or whose enforcement is discriminatory are inconsistent with, and violate IHRL. Human rights, generally, are critical tools to understand and analyse the application of the criminal law, and can be understood to set clear limits on what type of conduct – and whether and, if so, within what parameters – States can lawfully criminalize.

d) The Jurists' deliberations

20. Over the course of the two-day expert meeting, the jurists debated a wide-range of issues and propositions, which, in turn, prompted consideration, canvassing and deliberation of several other questions. The participants broadly agreed that certain propositions, issues and novel questions were critical for the elaboration of a set of key principles – based on substantive criminal law and human rights law – to address criminalization's detrimental impact on health, equality, and human rights, including, in particular, in the context of the select areas.
21. The jurists' deliberations were also vastly enriched by descriptions and referencing that several participants provided of seminal jurisprudential decisions from different jurisdictions, and legal systems. The participants also broadly agreed that certain 'process issues' would in and of themselves be critical to the success or failure of the whole enterprise. Among these, were those relating to the need for consultations, and the breadth of these consultations, with a view to ensuring the buy-in of affected communities, civil society, as well as the support from, engagement and involvement of key UN Agencies, including chiefly UNAIDS, OHCHR, UNDP and WHO.
22. Another 'process issue' related the actual process of elaboration of a set of key principles, which would have to be identified within a range of different models (e.g. the Yogyakarta, Siracusa, Maastricht Principles). These procedural questions had both an impact on the subject matter and content that the principles would ultimately address and, in turn, on their effectiveness, credibility, legitimacy and authority vis-à-vis their expected beneficiaries, including some end-users. In light of this, the present section of this report summarizes the discussions, both those concerned with substantive criminal law and human rights, and those that may be more broadly characterized as being concerned with 'process issues'.
23. The discussions over the course of the two-day meeting were prompted by and followed a series of presentations from the various participants. For ease of reference, the jurists' deliberations are set out in this section, at times using the titles of the various sections of the two-day meeting's agenda. The initial questions for consideration featured within the agenda are set out in the footnotes.

Introductory session

24. The introductory remarks highlighted how millions of people worldwide are subjected to the improper use of the criminal law. While there has been significant progress towards reform, e.g. in respect of HIV prevention and treatment, key populations continue to face greater risks, in many respects because of a lack of legal protection, and as a result of conduct being criminalized. This, in turn, reduces their ability to access many key

services for prevention, treatment and care. In this context, the speakers affirmed that the application of human rights principles to criminal law is key in order to address its detrimental impact in the select areas.

25. Several participants also highlighted the importance of criminal law as a legitimate and in some instances necessary tool for rights protection and recognition, and in the fight against impunity. They emphasized the importance of justiciability for human rights violations, but stressed that, with the authority of punishing individuals and depriving them of their liberty, comes a serious responsibility. Thus, recourse to the criminal law should be subjected to real scrutiny, especially where it has perverse consequences. Resort to criminal law as a tool of oppression and repression was said often to be too easy. But the wrongful deployment of criminal law betrays the rights to mental and physical integrity, to name but a few, especially of women in respect of sexuality and reproduction. The ultimate purpose of this enterprise should be to affirm the protective ambit of the criminal law while reducing its abuse. To protect those wrongly subjected to it, and deepen its credibility by subjecting it to the rule of law.
26. With respect to this, some jurists emphasized the importance of grappling with the rule of law, not as an abstract notion, but a substantive conceptualization of the rule of law. The rule of law is a normative concept, capable of acknowledging, reflecting and affirming human rights, the separation of powers and the independence of the judiciary. Such a notion of the rule of law, so accepted, in turn, would compel the repeal of laws that are arbitrary and discriminatory. The session stressed that the misuse of the criminal law affects the most marginalized groups of people, the dispossessed and disenfranchised. This misuse is contrary to international human rights law and to the rule of law itself. The session considered how the rule of law is undermined by the illicit use of the criminal law, that is, the criminal law as a tool of oppression and repression. The wrongful deployment of criminal law betrays the rule of law. The most intrusive instrument of State power, the criminal law, is misused against key populations violating the notion of the rule of law, as criminalization in the context of the select areas is typically unreasonable, irrational and improper. There was broad agreement among participants around the proposal that a substantive notion of the rule of law ought to underpin a set of key principles to address criminalization in the context of the select areas, a notion of the rule of law rooted in individual liberty and correlative fundamental freedoms. In conclusion, there was a broad agreement for adopting an expanded conception of rule of law and applying it as an additional guiding compass for the eventual elaboration of a set of key principles.

Human rights and criminal law: their relationship and introduction to the principles

27. During this session, participants addressed a number of key questions, including the role of human rights and criminal law principles in determining what should be criminalized and when criminal laws are being abused. Certain questions featured in the agenda were used as prompts for the ensuing discussions.³⁵

³⁵ In this segment, the following questions were used as prompts for presentations and ensuing discussions: what are the qualities that substantive criminal provisions defining offences must possess for them to comply with international human rights law and standards? Are human rights and criminal law principles sufficient to address issues concerning misuse of criminal law? Why or why not? What is missing? How can principles be formulated at a level of generality so as to cover all areas of concern, but with enough specificity to give meaningful guidance?

28. This segment began with emphasis being placed on the ideological underpinning of the proposed principles. Aspects of ideology, culture and religion were creating polarized narratives and behaviour. For example, the conceptual divide between respecting and protecting women and women's "respectability", the protection of women's ability to have rights were highlighted as unresolved and still deeply problematic. Women's role as primary care takers of children, something that is rooted in reality, but that is clearly stereotypical, was emphasized in this context. Sex work was highlighted as another illustration of the divide that still exists between liberation and protection. In this context, some simply considered women largely as victims – which was a deep ideological posture within the criminal law and human rights system. In areas where criminal law 'protects', largely, it has been misused when it comes to gender and ideas about expression of 'masculine sexuality'. The discussions underscored how gender provided a fertile ground for the creation and application of stereotypes – particularly, when courts are not given clear guidelines, as judges tend to apply 'folk knowledge' – and that this, in turn, impinges especially on morality issues relating to public health. So it would be critical for the principles to address 'folk knowledge' and stereotypes, which, in turn, manifest in stigma and discrimination. The discussions thus stressed the need to bear in mind that the way courts read "principles" vary a great deal, and that, therefore, in elaborating any set of principles in relation to the application of the criminal law to these areas, there is a need to extract oneself from notions of morality and 'folk knowledge' in relation to public health and the law.
29. Participants underscored the need to consider and adopt an evidence-led and public health science approach. They stressed how, at times, scientific evidence was being neglected when it comes to creating laws, policies and programmes, despite the fact that, in certain circumstances, there is evidence supporting decriminalization, which goes largely ignored.
30. The discussions also stressed that health evidence could be and was being manipulated to promote ideological stereotypes, for example, in relation to gender and race. The discussions highlighted the need to influence how health evidence is generated – in order for it to be even more helpful and effective in human rights advocacy. Thus, participants underscored the need to build age and gender sensitivity, and evidence-led approaches into the principles, with a view to ensuring that criminal laws, in turn, be non-discriminatory and based on scientific evidence. The principles, or at least a commentary accompanying them, should point out the above-mentioned pitfalls in respect of health evidence, and stress that properly conceived and deployed health evidence demonstrates the need for a human rights-based approach and upholds human dignity.
31. The deliberations also highlighted the need for the principles to grapple with and provide guidance on issues surrounding age. The jurists discussed repeatedly during the meeting the impact of the criminal laws in the context of the select areas on under-18s and, in particular, on adolescents. The participants identified a number of topics as particularly pertinent in considering the adverse effect of the criminal law on under-18s, especially adolescents, as requiring further research and detailed consideration and on which, ultimately, the principles might provide guidance. Among them were: the relevance of age; testing each principle eventually developed by considering how it would affect under-18s; how have courts grappled with addressing instances where children may be victims or perpetrators of crimes; age of consent in relation to sexual conduct, and in

particular, issues relating to adolescents and consent; and defences to and exemptions from criminal liability, including being below the age of criminal responsibility.

32. Some jurists stressed that those criminally sanctioned are often marginalized and stigmatized. In that connection, it is the autonomy of an individual as a human being that was often undermined and under threat. The discussions underscored the critical importance of engaging with the real people who are primarily affected by criminalization, including to know why and when the blunt instrument of the criminal law is needed, or, on the contrary, why it ought not to apply in the context of the select areas. The discussions also highlighted the need to challenge morality claims and distorted notions of harm to justify discriminatory laws. Commitment to reason, empirical methods and evidence-based approaches were other areas of challenge identified, with the dismissal of facts, experts and empirical evidence common in many contexts. Irrational fear and stigma were in some places endemic and present at the highest levels, including among jurists. There is no assurance of progressive linear advance. There was therefore a need to confront the pervasive role stigma plays in law and policy. This segment underscored that it would be prudent to adopt a certain, moderate despondency in respect of the criminal law; that, within the diverse settings in which a set of key principles would apply, it was important to consider an evidence-led approach and public health science; that strategy would determine which principles would be most relevant and effective in a given context; that the principles must adopt an expanded conception of rule of law; and that there was a need to continually review the shifting nature of stigma and discrimination and their impact on criminalization.

33. The participants underscored the importance of securing the buy-in and engagement of judges as central to the endeavour at hand given that progressive members of the judiciary, world-wide, had played a critical role in challenging unjust criminalization.³⁶ The jurists around the table were there in recognition of their experience and expertise. The participants reaffirmed the need to build on these. They concluded that the principles themselves would be made more effective if they were elaborated by distinguished and expert jurists in the field; if they were based on rigorous and meticulous research and analysis and based on evidence. However, the jurists also underscored that such set of key principles would certainly not be the entire solution to the problem, but one piece in a larger puzzle. Past experiences, however, attested to the effective role that jurists have played in the elaboration of certain legal principles, in their dissemination and ultimately their implementation.³⁷ In this context, activist jurists may be highly effective and influential.

34. In addition, the participants underscored that the principles may indeed address and be helpful to a range of other stakeholders, beyond judges, such as members of legislatures and prosecutorial authorities, advocates and activists, as well as members of affected communities, with a view to assisting them in assessing the question of the legitimate use of the criminal law. They would assist in, for instance, amending, reforming, revising and adopting new provisions. The discussions also emphasized that, since ultimately such a set of principles would first and foremost be an advocacy tool, the engagement of affected communities and stakeholders would have to be secured.

³⁶ See, "Background Paper 1: Thematic areas".

³⁷ For example, principles developed by prior colloquia and expert groups related to the application of international human rights law in other contexts, such as the [Siracusa Principles](#), the [Maastricht Principles](#) and the 2006 [Yogyakarta Principles](#), in the elaboration of each of which the ICJ played a prominent role, have had a significant impact on the development of national and international jurisprudence.

The jurists' deliberations stressed the need for strategic advocacy interventions to build momentum around the future principles. The jurists broadly agreed that there was a need for effective dissemination and promotion strategies.

Principles of legality and legitimate purpose in human rights and in criminal law

35. During this session, participants addressed a number of key questions,³⁸ including some arising in connection with the principles of legality and legitimate purpose in human rights and in criminal law.
36. The discussions focused on the guidance that the principles should provide with respect to immorality, and whether it was ever sufficient, in and of itself to justify a criminal prohibition consistent with the need for the criminal law to satisfy the legitimate purpose principle. Participants also put on the table the question of whose morality was being considered. For example, LGBTIQ rights were typically impacted by ideological or normative positions. Thus, it was important to ensure that certain principles or values would underpin the proposed principles. The principles must not become mired in cultural relativism, which is incompatible with universal human rights and the rule of law. In terms of morality, the participants discussed and broadly agreed that morality said to be compelled by religious authority should have no role in criminalization. In addition, participants pointed out that certain constitutional protection language, e.g. with respect to protecting safety, morality and traditional values, as well as the protection of children, was being used as justification for criminalization, particularly in the context of sexuality. In light of this, some participants expressed concern around creating exceptions in any new principles around the protection of children, as an example.
37. The discussions emphasized that there was a legitimate purpose in promoting certain norms, but not others, and it was important to give examples of such instances in the principles. The same point was made in respect of the use of public health as a legitimate purpose – some areas were legitimate, but some were not, and they should be articulated. The same went for the aim of “protecting against harm to others”. Legitimate purposes should be lifted, in large part, directly from human rights law: those set out are the bases on which States may legitimately limit rights for the purposes of criminal law proscriptions.³⁹ One question raised was whether, insofar as legitimate purpose was concerned, there were alternative measures or arguments that constituted legitimate purposes in addition to public health and morals, national security, and protecting the rights of others. The participants also underscored that, to comply with

³⁸ In this segment, the following questions were used as prompts for presentations and ensuing discussions: What interpretations of these principles have supported decriminalization of these issues? Consider the legality principle and how vagueness of laws and lack of specificity have been used to support decriminalization? What factors were considered for these interpretations?

Consider the justifications used under the principle of legitimate purpose and how they have been addressed by courts to support decriminalization and to justify criminalization. For example, consider the parameters of the following justifications: Morality and promoting common social norms and values; Public health; Harm to others. What are the prevalent biases/stereotypes in these understandings and how have laws and the courts addressed them? What elements/factors are necessary to support decriminalization/not criminalizing under each of these principles? Consider how and what evidence is used for support.

³⁹ Namely, national security or public safety, public order (*ordre public*), the protection of public health or morals and the protection of the rights and freedoms of others.

the principle of necessity, less restrictive alternatives to the criminal law should be considered in the first place.

38. The participants highlighted the challenge arising when laws, despite their role in guaranteeing rights, may at the same time yield arbitrary results. This was particularly the case in the context of the role of the law in providing protection. The principles of reasonableness and proportionality were especially relevant and were far from being vague, and indeed may be implemented in a practical a concrete fashion. Even when constitutions empowered legislators to curtail individual rights, they provided limits, especially when it came to reasonableness and proportionality. In addition, certain constitutional texts provided strong protection for the right to private life, which had been of significant assistance in addressing criminalization-related human rights violations. However, it was pointed out that dignity had in some instances prevailed over other principles, including the right to privacy. Particularly in contexts in which the State had to intervene, privacy had been less used as a legal argument.
39. The case of decriminalization of abortion and the use of cannabis and certain other drugs were mentioned as examples. States' punitive powers could go so far as to affect issues of human dignity. Participants noted that individuals consuming harmful drugs ought to be tended to by the State, rather than being the object of sanctions. The role of the courts was to affirm that morally acceptable ways of life could not be imposed through punishment. The purpose of criminal law was re-socialisation and not retaliation. It was legitimate to consider on the one hand harm an individual may do when under the influence of drugs (like with alcohol), but personal and private use was a separate issue.
40. It was also legitimate to question necessity in the law, i.e., why should certain aspect of people's lives – especially private lives – be legislated. At times the legislation's purpose and intentions may be salutary, but left unchecked may cause unintended harm. Another element put on the table was the value and relevance of international law, which over time had been incorporated into domestic law.

*Principles of Necessity, Proportionality and Reasonableness*⁴⁰

41. With respect to the principles of necessity, proportionality and reasonableness, one proposal made during the session was to create a matrix setting out: the stated purpose of criminal law, and whether that purpose is legitimate; whether the law is necessary;

⁴⁰ In this segment, the following questions were used as prompts for presentations and ensuing discussions: What interpretations of these principles have supported or would support decriminalization of /not criminalizing some of the conducts, including, e.g., those pertaining to sexual conduct, reproduction, drug use and drug possession for personal use, and overly broad criminalization of HIV transmission, non-disclosure and exposure. What is taken into consideration when determining when legal responses other than the criminal law are adequate, assuming a legal response is necessary at all, under the principles of necessity and proportionality? Under the concept of reasonableness, what factors are important in determining when other less restrictive means are available to achieve the aim of the law, including the impact the criminal law has on the health and well-being of individuals and society on these issues? What are other means by which the state can address root causes of social misconduct? How different conceptions of harm have been used to justify a wide range of arguments both in favor of and against the application of criminal law. What counts as harm? Harm to whom? Consider crimes whose sole 'victims' are the defendants. Consider the notion of consent and what is considered consensual? Consider how notions of consent influence understandings of harm? What are the prevalent biases/stereotypes in these understandings and how have laws and the courts addressed them. What elements/factors are necessary to support decriminalization/not criminalizing under each of these principles? Consider how and what evidence is used for support.

and whether the law is proportionate to a legitimate purpose. Generally, most of the answers with respect to the issues under consideration, i.e. criminal laws in the context of the select areas, would likely result in negative answers. For example, private religious views to enforce criminal law and protect morals by proscribing sex between gay men, would clearly be identified as 'not necessary', even if one would be able to get above the legitimate purpose test. Another illustration, for example, the criminalization of sex between men to prevent HIV – all evidence would point to a negative response, suggesting that in fact criminal laws would actually be counterproductive. Thus, in this example, criminal laws would neither be proportionate or necessary, even if the legitimate purpose test were met. The discussions indicated that legitimate purpose, in fact, touched upon all issues. For example, with respect to the criminalization of sex work – one of the purposes said to be served by criminal proscriptions is to protect vulnerable persons from being exploited and abused in a variety of contexts. However, why was criminalization specifically of sex work needed when there were existing criminal laws that already prohibited abuse and exploitation? With respect to proportionality and reasonableness, the State could only use means that were fit, necessary and appropriate. Criminalization pursued for the prohibition and elimination of drugs had been around for a long time, but the objective was not achieved. Criminalization of drug use for personal consumption had had many adverse consequences just as alcohol prohibition laws in 1920s had created an endemic criminal environment, and driven the alcohol industry underground.

42. The discussions emphasized that there was a need to consider the misuse of good intentioned laws in line with international human rights principles. Another point underscored was the need for guidance on how to scrutinize laws that had a religious foundation – e.g., the criminalization of adultery, abortion, etc. However, caution was expressed about focussing exclusively on 'religiously based rationales' of some criminal law provisions, especially with respect to controlling women's sexuality, because there were secularist regimes that had analogous criminal laws and criminalization policies. Therefore, the discussions pointed to the need to challenge anti-human rights based laws wherever they originated. Indeed, it was underscored that the discourse should focus on dignity rather than morality.
43. Another suggestion was to consider whether the concept of democracy may be useful – as the principles may be unpopular, they may require consideration of framing them within the notion of 'democratic, just and free societies'. The participants also underscored the need to consider local implications, and the potential for acceptance of criminal law reform with much more nuance. In this context, some participants stressed that, for the principles to work, the role of national and international courts and treaties, and the interpretations of treaties, needed to be considered.
44. Some participants underscored the need to outline, clarify and explain the foundational principles of criminal law, and then address how human rights laws and standards related to these principles. Other jurists emphasized that the notions of arbitrariness, proportionality and unreasonableness should perhaps not be conflated, and that instead, reasonableness, which would often get subsumed under proportionality, may be considered separately.

*Principle of non-discrimination in human rights and autonomy/freedom in criminal law*⁴¹

⁴¹ This session used the following questions as prompts for presentations and ensuing discussions: what elements/factors are necessary to effectively address both direct and indirect discrimination in

45. The participants endorsed further exploration in respect of the possibility of removing the use of comparator, where used, in assessing discrimination or defining equality: in order to arrive at the conclusion that a group of persons is discriminated against, the use of tools such as the impact of a law, a policy or a measure on individuals would lead to better outcomes in achieving substantive equality than comparing the situations of a group against another group that may be as badly situated. The discussions also underscored the need to link autonomy and dignity with equality: the impact on autonomy and dignity would be used as tools for measuring the extent to which a particular measure (e.g., a law or policy) infringes on the right to (substantive) equality of a person. The jurists also broadly agreed that there was a need to further address the intersectionality of grounds of discrimination, and take into account individual experiences and how personal circumstances of compounded discrimination contribute to further limit the rights to dignity and autonomy. In this context, the participants underscored that there was a lot to learn from national courts that have gone further than international fora. For instance, there was need to consider drug use, sex work as explicit grounds for non-discrimination in law, as well as the status of being a prisoner as explicit grounds for prohibited discrimination. It was also important to identify the elements or factors necessary to effectively address both direct and indirect discrimination in criminal laws.

Further deliberations on the second day

46. Some of the discussions during the second day aimed to consolidate and recap on what was achieved the previous day.⁴² The discussions underscored the need to build upon principles (e.g. like the Siracusa Principles), while being aware that the historical context was different, namely, one in which States relied on criminal laws to scapegoat vulnerable groups and deflect public attention from more serious social issues.

47. The participants emphasized the importance of taking a historical and questioning approach to the elaboration and development of the criminal law. They underscored the need to ensure that the task at hand is not undertaken ahistorically, and that there should be no complacency and no complicity with problematic notions. In this context, the discussions highlighted the need to recognize that tools such as human rights, criminal law, public health have their own contested and complicated histories. While, on the one hand, the jurists emphasized that the State could not be trusted in the way in which it demarcated which acts and omissions should fall within the purview of the criminal law, using human rights as a tool to evaluate the criminal law, on the other hand, also came with its own challenges.

criminal laws? What elements/factors are necessary to effectively address intersectional discrimination? Consider the relationship between non-discrimination principle and the principle of autonomy/freedom in criminal law, how they do or don't influence each other. What tools have courts/legislators and other bodies used to address biased, incorrect or misinterpreted medical or scientific evidence that is discriminatory? What elements/factors are necessary to support decriminalization/not criminalizing under each of these principles? Consider how and what evidence is used for support.

⁴² The sessions on the second day used the following questions as prompts for presentations and ensuing discussions: what main elements/factors under each of the principles that arose in the course of the discussions the previous day were helpful in moving the objectives of the meeting forward? Were there any cross-cutting factors? Were there any issues of concern or that were not broached but should have been?

48. In this context, some participants stressed that a gendered analysis would be important. And so would the recognition that the history of human rights in relation to sexuality was a complicated one and a place of vexation and contestation. For instance, there was a need to tackle the “protection versus liberation” and the “respect versus respectability” contexts within which women’s situations have principally been envisioned. The discussions underscored the need for awareness of the tension between protectionism and protection, and the ability to exercise rights, and, at times, of the complicity of frameworks within which the participants operated – including the international human rights law framework, public health research agendas, and intergovernmental processes.
49. The jurists acknowledged and discussed some of the main challenges at hand. They recognized, for instance, that the actual notions of criminalization, decriminalization and legalization should be unpacked for further consideration. The discussions highlighted the fact that the notion of harm versus wrong, and the fact that some social norms and values may be accepted as legitimate within the context of democratic, just and fair societies did not always assist in determining where the line should be drawn between criminal and non criminal conduct.
50. There was broad agreement for the proposition that, while it was critical to tackle the misuse and abuse of the criminal law, it was imperative that the principles not detract from or otherwise undermine an appropriate use of the criminal law, including, for example, in the context of sexual violence and domestic violence.
51. The jurists also discussed the notion of the commensurability of punishment. With respect to this, the jurists debated how the notion of commensurability should be considered both in relation to the gravity and the severity of the harm that the crime caused or risked causing, and also in relation to the degree of culpability with which it had been committed. All things being equal, the greater the harm caused or risked and the greater the accused’s culpability, the more severe the punishment. However, the commensurability of punishment was an issue that would deserve further consideration to understand the extent to which it applied to criminalization in the context of the select areas, particularly when neither necessity nor legitimate purpose was met.
52. The participants also identified other issues as requiring further consideration, including research, such as the notion of harm; the notion of consent,⁴³ and what was considered consensual and, in particular, how different notions of consent influenced understandings of harm; consent to sexual acts; the legitimate aims recognized by international law and standards for imposing restrictions on human rights for the purposes of criminal law proscriptions, namely, national security or public safety, public order (*ordre public*), the protection of public health or morals and the protection of the rights and freedoms of others; the notion of effectiveness of the criminal law in pursuing a purpose that is ostensibly legitimate; how the notions of arbitrariness, proportionality and reasonableness should be considered separately, without conflating them; research would also be needed in the area of drug offences with respect to so-called possession offences, which had proliferated as a way to criminalize behaviour. However, arguably, they violated the requirement that crimes corresponded to/entailed “some act” (the material element); the quasi criminal use of State powers, e.g. through the imposition of civil orders, where the effect/impact was analogous to a criminal sanction. While the

⁴³ Indeed, some participants sounded a note of caution against creating a legal standard of consent to control behaviour; even the notion of informed consent should be approached with great caution.

focus had been on substantive criminal law, there were other punitive laws or procedural aspects that may warrant consideration where their impact was analogous to that of criminal sanctions. Related to this, the notion of an autonomous classification of criminal offences needed exploring. The “Engel doctrine” in the jurisprudence of the European Court of Human Rights provided one model, namely, that the domestic classification of something as criminal was only the starting point, and the analysis may go further, based on an autonomous meaning depending, in turn, on considerations of the gravity/seriousness of the detriment to which the individual was subjected through the relevant proceedings – even when they were characterized as civil, for example, domestically.

53. The jurists broadly reaffirmed and agreed that it would be important to continue focusing on the select areas. They had been identified and their choice was the direct result of previous meetings. There was also ample evidence that criminalization has had a serious and negative impact on public health, equality, and human rights in relation to each of the select areas. However, the discussions also endorsed the proposition that maintaining a focus on the select areas did not mean that the set of key principles eventually adopted may not actually also be applicable to criminalized conduct beyond the select areas.

e) Concrete activities going forward

54. In addition to the issues highlighted in the previous sections, this final part of this report seeks to briefly outline a range of concrete activities that may be considered in the immediate and medium term with a view to moving to the next phase in the elaboration of a set of principles.

55. In moving forward, the need to consider broader engagement with stakeholders and constituencies – e.g., civil and common law jurisdictions, north and south – is critical. The elaboration of the principles would need to ensure effective engagement and consultation with CSOs working on decriminalization in each of the select areas and other stakeholders, including members of the communities affected by criminalization in the above-mentioned select areas, as well as the continued engagement and involvement of key UN Agencies, including chiefly UNAIDS, OHCHR, UNDP and WHO. In this context, there is a need to consider diverse avenues and models on envisaged civil society engagement throughout the process of developing the principles, e.g. starting with an online consultation, dissemination of the present report and background papers, reaching out through networks to ensure extensive dissemination of the same.

56. Many – if not all – of the propositions broadly endorsed at the expert meeting as constitutive elements drawn from either foundational principles of substantive criminal law and/or from international human rights law and standards, may also be helpfully compiled together in the short to medium term as building blocks/elements for a set of key principles to address the detrimental impact of criminalization, in particular in the context of the select areas with a view to eventually formulating a zero draft for consultation. The principles ought to be linked to other practical tools, e.g. training modules, and workshops, which have a demonstrated impact especially in the context of advocacy initiatives.

International Commission of Jurists, Geneva, 30 October 2018

Annexes: Background Paper 1 and 2



BACKGROUND PAPER 1:

Thematic areas

Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV

Conveners: International Commission of Jurists (ICJ), UNAIDS and OHCHR

Room XXIII, Building E, Palais Nations

Geneva, Switzerland

3-4 May 2018

Table of Contents

I. About the background paper	27
II. Criminal law and human rights: A brief introduction	27
III. Thematic areas to be discussed during the meeting	29
1. Sexual orientation, sex characteristics, gender identity and expression	29
2. Abortion	33
3. Sex work	37
4. Adultery	43

5. HIV non-disclosure, exposure and transmission	47
6. Drug Use.....	51
IV. Commonalities in the issues	

I. About this background paper

Two papers comprise the background documents for the International Commission of Jurists, UNAIDS and OHCHR convening of jurists to be held 3-4 May 2018, in Geneva. One paper is focused on human rights and the criminal law principles (see attached).

This current paper serves mainly to provide a general understanding of the various substantive thematic areas that will be discussed during the jurists convening, so as to enable all participants to have a leveled understanding of some of the key legal, human rights and public health issues that they involve. This background paper is not an exhaustive description of these substantive issues, it rather provides important elements for understanding the scope of the issues, the justifications often invoked in support of the criminal law and the human rights considerations and public health impact of such use of the criminal law.

It is based on a paper commissioned by the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS Secretariat) and the Office of the High Commissioner for Human Rights (OHCHR) which provided background information for discussions during a meeting of stakeholders on understanding and building synergies for addressing the misuse of the criminal law and its impact on women, sex workers, people who use drugs, people living with HIV and lesbian, gay, bisexual and transgender (LGBT) persons held in Bellagio, Italy on 8-10 February 2017.⁴⁴

II. Criminal law and human rights: A brief introduction

Criminal law is both "a law which protects" and a "law from which protection is required".⁴⁵ The relationship of human rights with domestic criminal law has been described in terms of a binary function: "the sword/shield dichotomy".⁴⁶ The "shield" function of human rights works to protect individuals against the power of the State,

⁴⁴ The paper was written by Christina Zampas, consultant. It was finalized in January 2017. Lucinda O'Hanlon and María Carolina Jiménez García of OHCHR, and Luisa Cabal and Patrick Eba of UNAIDS advised on the structure and content of the paper and provided edits to the text. Comments and edits by Farida Shaheed, Jaime Todd-Gher, Ruth Morgan Thomas, Edwin Bernard, Rick Lines, Eszter Kismodi, Ronald Johnson, Rajat Khosla and Michael Van Gelderen to an early draft of this paper are gratefully acknowledged. The opinions expressed in the paper are those of the author and do not necessarily reflect the views, opinions and policies of OHCHR, the UNAIDS Secretariat or its co-sponsoring organisations.

⁴⁵ Françoise Tulkens, "The Paradoxical Relationship between Criminal Law and Human Rights", *Journal of International Criminal Justice* 9 (2011): 577-595. See also: R. Koering-Joulin and J.-F. Seuvic, "Droits fondamentaux et droit criminel", *L'Actualité juridique. Droit administratif* (July - August 1998) 106-129, at 106.

⁴⁶ See in particular, Tulkens, *supra* note 45; J.A.E. Vervaele, "Régulation et répression au sein de l'Etat providence. La fonction "bouclier" et la fonction "épée" du droit pénal en déséquilibre". *Deviance et société* (1997) 121-122.

including its criminal law functions. For instance, human rights guarantees related to freedom of expression and association and fair trial are examples of how the human rights framework shields individuals from State application of criminal law (and, in some cases over-reaching). The “sword” function of human rights calls on the State to utilize its police power to respond to acts, behaviors or situations that infringe individual rights. For example, criminalization of domestic violence invokes the “sword” function where application of criminal law is deemed necessary for protecting the human rights of individuals.

In the areas of sexual and reproductive health and rights, sexual conduct, drug use and HIV criminalization, human rights bodies as well as national courts have regularly found criminal law provisions to be contrary to human rights norms and standards. Fundamental to the achievement of equality are the human rights to make decisions about one’s life and one’s body. These rights pertain to deeply personal choices concerning health care and treatment, among others. And in the area of sexual and reproductive rights, key issues involved relate to the individual’s right to autonomy concerning when, whether and with whom to have sex; when, whether and with whom to have children; when, whether and to whom to get married; people’s ability and ways of expressing their gender and sexuality. Securing these rights are also fundamental for the realization of other rights, such as the right to education, freedom of association, the right to work, to access justice, and the right to health.

Criminal laws governing sexual conduct, reproduction and drug use are often based on moral or religious beliefs rooted in notions about how people should conduct themselves, thus reinforcing existing stereotypes and/or justifying them. This manifests in laws that criminalize or otherwise restrict consensual sexual activity, including adultery, sex work or same sex intimacy; laws that criminalize certain sexual and reproductive health services, such as abortion or other health services related to drug treatment regimes; and laws that allow for overly broad criminalization of HIV non-disclosure, exposure or transmission. Numerous sources describe the negative impact on the enjoyment of human rights of states’ use of criminal laws to regulate or punish sexual conducts, sexuality, and sexual and reproductive health.⁴⁷ These sources also show that such

⁴⁷ Amnesty International, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador* [hereinafter “Abortion Ban in El Salvador”] (2014), <http://www.amnestyusa.org/research/reports/on-the-brink-of-death-violence-against-women-and-the-abortion-ban-in-el-salvador>; Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion* [hereinafter “Marginalized, Persecuted and Imprisoned”] (2014), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/El-Salvador-CriminalizationOfAbortion-Report.pdf>; Amnesty International, *The Total Abortion Ban in Nicaragua: Women’s Health and Lives Endangered, Medical Professionals Criminalized* (2009), <http://www.amnestyusa.org/pdfs/amr430012009en.pdf>; Open Society Foundations, *10 Reasons to Decriminalize Sex Work: A Reference Brief* (2012), https://www.opensocietyfoundations.org/sites/default/files/10-reasons-decriminalize-sex-work-20150410_0.pdf; Canadian HIV/AIDS Legal Network, *Women, Sex Work and HIV* (2012), <http://www.aidslaw.ca/site/women-and-hiv-women-sex-work-and-hiv/?lang=en>; UNAIDS, *Ending Overly Broad Criminalisation of HIV Non-disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations* (Guidance Note) (2013), [hereinafter “UNAIDS, Ending Overly Broad Criminalisation”] http://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf; Ipas, *When Abortion is a Crime: The Threat to Vulnerable Women in Latin America* (2013); <http://www.ipas.org/en/Resources/Ipas%20Publications/When-Abortion-is-a-Crime-The-threat-to-vulnerable-women-in-Latin-America.aspx>; Human Rights Watch, *Sex Workers at Risk: Condoms as*

criminal laws often have the impact of increasing stigma against already marginalized and excluded groups. The application of the criminal law in these areas has also been linked to heightened discrimination, and denial of critical health services.⁴⁸ It creates an environment where these groups of people are less likely to seek police intervention when their rights have been violated.⁴⁹

Criminalization also negatively impacts the interpretation and application of administrative or civil laws towards persons whose identity, conduct or circumstances are criminalized. For example, criminal laws banning adultery influence the implementation of laws governing rape and the treatment of rape victims; criminalization of abortion influences the application of homicide statutes to women undergoing abortions or having miscarriages; criminalization and other restrictions on sex work impact the application of anti-trafficking laws and their treatment of sex workers. The application of the criminal law towards these populations further heightens and compounds stigmatization and discrimination based on race, socio economic status, age, sex, sexual orientation or gender identity and expression, health and HIV status, disability or national origin, among others. This is evidenced, for example, in the discriminatory application of housing regulations to sex workers or to drug users. In the context of health care, this is evidenced in the withholding of health care services, including life-saving services such as needle exchange and opioid substitution therapy for drug users, or coercive practices, such as forced sterilization against women living with HIV.

III. Thematic areas

This section provides an overview of six thematic areas in relation to which the application of the criminal law raises particular concerns, namely: sexual orientation, sex characteristics, gender identity and expression; abortion; sex work; adultery; HIV non-disclosure, exposure or transmission; and drug use. The section briefly describes the nature and scope of the criminal law in each one of these areas, presents the arguments used to justify the use of the criminal law and outlines the human rights considerations and public health impact of the criminal law in these areas.

1. Sexual orientation, sex characteristics, gender identity and expression⁵⁰

a. The nature and scope of the criminal law

In countries around the world, laws that criminalize same sex conduct and gender identity and expression take a variety of forms and are derived from a range of legal

Evidence of Prostitution in Four US Cities (2012), <https://www.hrw.org/report/2012/07/19/sex-workers-risk/condoms-evidence-prostitution-four-us-cities>; Amnesty International, *She is not a criminal: the impact of Ireland's Abortion Law* (2015), http://www.amnestyusa.org/pdfs/Ireland_She_Is_Not_A_Criminal.pdf .

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ This section is not an exhaustive description of all the legal and human rights issues relating to sexual orientation, sex characteristics, gender identity and expression. It only covers some of the key considerations.

authorities. Same-sex sexual practices are criminalized in 73 countries and territories.⁵¹ Of these, at least 44 countries specifically criminalize same-sex conduct between women.⁵² Thirteen states and jurisdictions provide for the death penalty for consensual same-sex practices.⁵³ In some countries, criminal laws or civil laws restrict some forms of gender expression, such as restrictions on dressing, or public information on gender nonconformity.⁵⁴ At least eight countries criminalize so-called “cross-dressing”. In many more countries, transgender people also face arrest and prosecution on the basis of other, often vaguely defined laws.⁵⁵ In addition, some states have adopted so-called “anti-propaganda” and other laws that target freedom of expression related to sexual orientation and gender identity.⁵⁶ In addition, transgender and gender variant people in some countries are subject to compulsory medical interventions, such as sterilization, hormone therapies or psychological counseling – sometimes on the basis of specific laws. In many cases, these interventions are legally mandated as a prerequisite to legal gender recognition or gender reassignment surgeries.⁵⁷

b. Justifications for the criminal law

Countries that criminalize or otherwise restrict consensual same-sex conduct, gender expression and gender identity rely on several justifications for the existence of these laws. Common justifications relate to the protecting religion and morals. Many states utilize religious or moral justifications and appeals to support laws that negatively impact people whose sexual conduct or gender expression do not conform to social and cultural norms. These laws are often rooted in notions of sex occurring only in a marital union and for the purposes of procreation. Justifications also involve public safety which encompasses concerns regarding health, the maintenance of civic order, and child welfare. Another argument used to justify the criminal law relates to maintaining social and cultural purity as well as national identity. This argument involves citing non-conforming sexual orientation and gender identity as inimical to local norms and values based on binary norms of male and female, decrying same sex conduct and nonconforming gender

⁵¹ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State-Sponsored Homophobia, A World Survey of Laws: criminalization, protection and recognition of same sex love* (2016).

⁵² Human Dignity Trust, *Breaking the silence: criminalisation of lesbians and bisexual women and its impacts* (2016), www.humandignitytrust.org/uploaded/Library/Other_Material/Breaking_the_Silence-Criminalisation_of_LB_Women_and_its_Impacts-FINAL.pdf

⁵³ ILGA, *supra* note 51, p.37.

⁵⁴ Article 19, *Traditional values? Attempts to Censor Sexuality: Homosexual Propaganda Bans, Freedom of Expression and Equality*, (2013), <https://www.article19.org/data/files/medialibrary/3637/LGBT-propaganda-report-ENGLISH.pdf>; Amendments to Article 5 of the Federal Law “On the Protection of Children from Information Harmful to their Health and Development”, and Miscellaneous Legislative Acts of the Russian Federation for the Purpose of Protecting Children from Information that Promotes the Rejection of Traditional Family Values, Federal Law No. 135-FZ (2013) (Russian Federation); Emily E. Holley, *International Anti-LGBT Legislation: How Nationalistic Cultural Warfare Supports Political Motivations*, 24 TUL. J. L. & SEXUALITY 179, 182 (2015).

⁵⁵ OHCHR, *Living free and equal* (2016), pp. 56-57, <http://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf> and Criminalisation and prosecution of trans people; Trans Respect versus Transphobia, *Transgender Europe* (2016), <http://transrespect.org/>

⁵⁶ ILGA, *supra* note 51, pp. 40-41.

⁵⁷ Open Society Foundations, *License To Be Yourself: Laws and Advocacy for Legal Gender Recognition of Trans People* (2014), p. 8.

identity as being “foreign imports”. Accordingly, supporters of criminalization view calls for decriminalization as infringements on political autonomy and national identity.⁵⁸

Many of these have been considered by human rights bodies and have been overwhelmingly rejected as contrary to international human rights law; failing tests of necessity, proportionality and legitimacy; lacking a credible evidence base; and being contrary to the provisions, aims and objectives of international human rights treaties.⁵⁹

c. Human rights considerations

International and national jurisprudence around the globe have recognized that criminalization⁶⁰ of sexual conduct between consenting adults of the same sex, and criminalization of the gender identity and expression violate principles of dignity and the rights to privacy, to liberty and security, to equality before the law, and to be free from discrimination, among other rights.⁶¹ Courts and human rights bodies have also recognized that the criminalization of same-sex sexual conduct and of gender identity and expression legitimizes prejudice and exposes people to hate crimes, police abuse, torture and family violence, and discrimination in access to housing, education, and employment.⁶² Human rights bodies have called on states to address violence based on sexual orientation and gender identity, including providing effective protection from

⁵⁸ Holley, *supra* note 54, pp.179, 183.

⁵⁹ See, for example, *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994) (HR Committee), para. 8.5.

⁶⁰ Some of these laws, such as in India, do not explicitly target same-sex conduct, but they were originally drafted to prohibit sexual acts that are not procreative in purpose, and are often only applied to same sex conduct.

⁶¹ OHCHR, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, UN Doc. A/HRC/29/23 (2015); OHCHR, *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law [hereinafter “Born Free and Equal”]* (2012), p. 30; *Toonen v. Australia*, *supra* note 59; *Dudgeon v UK*, Application No. 7525/76, Judgement of 22 October 1981 (European Court of Human Rights); *Norris v. Ireland*, Application No. 10581/83, Judgment of 26 October 1988 (European Court of Human Rights); *Modinos v. Cyprus*, Application No. 15070/89, Judgment of 22 April 1993 (European Court of Human Rights); HR Committee, *General Comment No. 35* (CCPR/C/GC/35); HR Committee, Concluding observations: Kuwait (CCPR/C/KWT/CO/2), para. 30.

⁶² OHCHR, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, *supra* note 61; OHCHR, *Born Free and Equal*, *supra* note 61, pp. 22, 33. For example, in some countries where same-sex conduct is criminalized, men accused of being gay are forced to undergo forced, invasive and degrading procedures, such as anal exams, in order to absolve them of this “crime.”; *Toonen v. Australia*, *supra* note 59; *Naz Foundation v. Government of NCT of Delhi*, Decision of 2 July 2009, WP (C) No. 7455/2001 (India, High Court of Delhi at New Delhi); UNAIDS, *The Gap Report* (2014), p. 207-208, <http://www.unaids.org/en/resources/campaigns/2014/2014gapreport/gapreport>; World Health

violence and that all allegations of attacks and threats against individuals targeted because of their sexual orientation or gender identity are thoroughly investigated and prosecuted, accordingly.⁶³ Coercive medical practices, such as forced sterilization against transgender persons, for example, have also been condemned by human rights bodies.⁶⁴ The pathologization of lesbian, gay, bisexual and transgender people – *i.e.* branding them as ill based on their sexual orientation, gender identity or gender expression – is only one of the root causes behind the human rights violations faced by these persons. Medical classifications that pathologize and stigmatize LGBT people are also often used to justify discriminatory laws and practices.

d. Public health impact

Such laws and practices also harm physical and mental health by legitimizing prejudice and hence, for example, exposing people to hate crimes and other violence, and hindering access to health care, including hampering efforts to eliminate HIV.⁶⁵ Human rights and public health bodies have called for ending this violence and its negative health impact and for ensuring access to health care for all without discrimination.⁶⁶

As recognized by the World Health Organization (WHO), violence committed against persons because of their real or perceived sexual behavior or expression has been recorded in all regions of the world. These behaviors are perceived as being nonconformist, transgressing societal or moral codes or norms, and violence is used to punish people for such conduct. This violent punishment has severe detrimental impacts on health. It occurs in the home (caused by family members), in schools, in prisons and in health care settings, amongst other places. It may be physical or mental harm, and its effects include humiliation, disempowerment, injury and increased disease burden.⁶⁷

Evidence shows the link between criminalization and impact on access to health care. For example, recent studies in assessing the impact of criminalization of same-sex relations

Organization (WHO), *Sexual health, human rights and the law* (2015), http://apps.who.int/iris/bitstream/10665/175556/1/9789241564984_eng.pdf?ua=1

⁶³ HR Committee, Concluding observations: Mexico, UN Doc. CCPR/C/MEX/CO/5, para. 21; CESCR Committee, *General comment 20*, UN Doc. E/C.12/GC/20, para. 32 (recognizing gender identity as a prohibited grounds of discrimination and increased risk of human rights violations among transgender, transsexual or intersex persons).

⁶⁴ CEDAW, Concluding Observations: Netherlands, UN Doc. CEDAW/C/NLD/CO/5; OHCHR, *Born Free and Equal*, *supra* note 61, p. 41; Anand Grover, *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc. A/66/254 (2011), para. 59.

⁶⁵ WHO, *supra* note 62; Joint UN statement on Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, 29 September 2015, <http://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx>; UNDP, *Discussion Paper: Transgender Health and Human Rights* (2013), <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights.html>. **Criminalizing same sex behaviors also have others health impacts, for example, resulting denial of same sex unions or marriage and its negative impact well-being, on access to social benefits and on child custody.**

⁶⁶ CESCR Committee, *General Comment No. 22*, UN Doc E/C.12/GC/22 para 23 and *General Comment No. 14*, UN Doc. E/C.12/2000/4, para. 18 (prohibiting discrimination in the provision of health care on the grounds of sexual orientation).

⁶⁷ WHO, *supra* note 62, p. 40; see also OHCHR, *Born Free and Equal*, *supra* note 61.

found that men who have sex with men reported greater fear in seeking health care and greater avoidance of healthcare after the implementation of such laws.⁶⁸ Studies have documented serious disruptions in the availability of and access to HIV and other health services following widely publicized prosecutions of gay men and other men who have sex with men⁶⁹. Globally, gay men and other men who have sex with men are 19 times more likely to be living with HIV than the general population.⁷⁰

2. Abortion

a. The nature and scope of the criminal law

Across the globe, nearly all countries maintain penal code provisions setting forth the circumstances in which abortion is a crime,⁷¹ and may involve punishment of the abortion provider, the woman seeking the abortion, people who help women obtain abortion,⁷² or some combination of the three.⁷³ Generally, these laws prohibit abortion and then carve out explicit, enumerated grounds under which abortion is not criminalized, such as where pregnancy poses a risk to the woman's or adolescents life or health or in cases of rape or incest or fetal impairment. The most restrictive of these laws have complete bans on abortion, meaning that abortion is prohibited even where pregnancy poses an immediate risk to the woman's life.⁷⁴ Criminalization of abortion also creates a chilling effect on access to lawful abortion and to post-abortion care.⁷⁵

⁶⁸ Schwartz, S. R., et al., "The immediate effect of the Same-Sex Marriage Prohibition Act on stigma, discrimination, and engagement on HIV prevention and treatment services in men who have sex with men in Nigeria: analysis of prospective data from the TRUST cohort". *The Lancet HIV*, 2(7), e299-e306. 2015; Risher K, Adams D, Sithole B, et al. "Sexual stigma and discrimination as barriers to seeking appropriate healthcare among men who have sex with men in Swaziland". *J Int AIDS Soc* 2013; 16 (3 suppl 2): 18715

⁶⁹ UNAIDS, *The Gap Report*, supra note 62.

⁷⁰ *Id.*

⁷¹ Louise Finer & Johanna B. Fine, "Abortion Law Around the World: Progress and Pushback" (2013) 103(4) *American Journal of Public Health* 585.

⁷² El Salvador, for example, criminalizes those who provide financial support for abortions.

⁷³ See Center for Reproductive Rights, *The World's Abortion Laws* (2014), http://www.reproductiverights.org/pub_fac_abortion_laws.html; Rebecca J. Cook, "Stigmatized Meanings of Criminal Abortion Law" in Cook, R.J., Erdman J.N. and Dickens B.M. (eds.) *Abortion law in transnational perspective: cases and controversies* (University of Pennsylvania Press, 2014).

⁷⁴ Center for Reproductive Rights, *The World's Abortion Laws*, supra note 73; Louise Finer & Johanna B. Fine, supra note 71. While a number of other countries do not explicitly include exceptions for pregnancies posing a risk to the woman's life, many penal codes excuse criminal liability if an act is performed in order to save one's own life or the life of another person, and therefore abortion may be performed on the basis that it was necessary to preserve a woman's life. Conversely, in Chile, Malta, El Salvador and Nicaragua the availability of the necessity defense is questionable, as these countries previously explicitly authorized abortion to preserve a woman's life, but have since removed these exceptions.

⁷⁵ *Case of Tysiac v. Poland*, Application No. 5410/03, Judgment of 20 March 2007, para. 18 (European Court of Human Rights).

While penal code provisions concerning abortion are increasingly being replaced or supplemented by public health codes, court decisions, and other regulations and laws guaranteeing access to abortion,⁷⁶ the criminal prohibition of this reproductive health service remains pervasive, with serious negative consequences on health and a range of human rights. Currently, 40% of the world's population live in countries with restrictive abortion laws. Some 66 countries completely prohibit abortion or only have a life exception, and 59 countries have both a life and health exception.⁷⁷

In some jurisdictions, criminal bans on abortion also create stigma and have a chilling effect on access to lawful abortion and in some places also operate to place all pregnant women under a cloud of suspicion.⁷⁸ In addition to having specific provisions on abortion in their penal code, some countries have constitutional provisions that influence the use of the criminal law to regulate abortion. In some jurisdictions, proponents of abortion criminalization have advocated for the increasing use of constitutional and criminal law provisions to recognize and protect prenatal life, to the detriment of women's rights.⁷⁹ In El Salvador, for example, a total ban on abortion combined with a constitution that recognizes life from the moment of conception, has resulted in the state enforcing a prenatal right to life by prosecuting not just abortion-related crimes but also women who have experienced miscarriages as homicide rather than abortion.⁸⁰

The criminalization and resulting stigma around abortion also influence regulations of the procedure. For example, medically unnecessary requirements before accessing a lawful abortion are a serious barrier to such services, with the criminal law often being behind such barriers. These include mandatory waiting periods and biased counselling requirements, medical practitioners refusal of care based on grounds of conscience, and third party authorization requirements.

In all situations it is women belonging to marginalized groups that are the most impacted, such as adolescents, racial or ethnic minorities, migrants, low income women, and women with disabilities, among others.

b. Justifications for the criminal law

Criminalizing abortion and reproductive health conditions, reinforce harmful, false stereotypes about women's inability to make their own decisions about reproduction and their need to be controlled and are often justified based on wrongful stereotypes about women's primarily role as mothers and caretakers. Invoking the criminal law shifts the

⁷⁶ Louise Finer & Johanna B. Fine, *supra* note 71.

⁷⁷ Center for Reproductive Rights, *The World's Abortion Laws*, *supra* note 73.

⁷⁸ *Case of Tysiak v. Poland*, *supra* note 75; Amnesty International, *She is not a criminal: the impact of Ireland's Abortion Law*, *supra* note 47.

⁷⁹ Amnesty International, *She is not a criminal: the impact of Ireland's Abortion Law*, *supra* note 47; Center for Reproductive Rights, *Whose Right to Life? Women's Rights and Prenatal Protections under Human Rights and Comparative Law* [hereinafter "Whose Right to Life?"] (2014). <https://www.reproductiverights.org/document/whose-right-to-life-womens-rights-and-prenatal-protections-under-human-rights-and-comparati>.

⁸⁰ Amnesty International, *Abortion Ban in El Salvador*, *supra* note 47; Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned*, *supra* note 47; Center for Reproductive Rights, *Whose Right to Life?*, *supra* note 79.

focus from the provision of medical care to gathering of evidence needed to sanction the wrong doer. It presumes the woman is the wrong doer and discounts her health care needs, including life-saving procedures. Criminalization is justified based on notions that essentialize women as mothers and instrumentalizes their bodies and lives by applying the force of the criminal law and removing decision-making authority in relation to reproduction.

Their socialized roles and their sexuality are used in order to proscribe their decisions and actions in connection with pregnancy and punish them for behavior or actions that contravene these norms.⁸¹ The UN Working Group on Discrimination against Women has recognized that,

*"[c]riminalization of termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives, subjecting them to risks to their lives or health in order to preserve their function as reproductive agents and depriving them of autonomy in decision-making about their own bodies ...In some countries, as a result of retrogressive anti-abortion laws, women are imprisoned for having had a miscarriage, imposing an intolerable cost on the women, their families and their societies."*⁸²

Similarly, the CEDAW Committee in the case of *L.C. v. Peru*, has affirmed that this stereotype, "understands the exercise of a woman's reproductive capacity as a duty rather than a right."⁸³ As such, the Committee has noted that this stereotype suggests that the protection of a fetus is paramount to a woman's and girls personal interests and needs, and relegates her to a reproductive instrument.⁸⁴ As recognized by the CEDAW Committee, many countries also justify restrictive laws based on protecting fetal interests. This justification along with women's role as primarily mothers, are often indistinguishable and have their basis in religious beliefs that place paramount importance on protection of potential or prenatal life, to the detriment of women.

c. Human rights considerations

International and regional human rights bodies have repeatedly condemned restrictive abortion laws, grounded in the rights to life; health; privacy; equality and non-discrimination; and freedom from cruel, inhuman or degrading treatment or punishment. These bodies have called on states to liberalize legislation criminalizing and prohibiting abortion and guarantee women access to safe abortion services.⁸⁵ Recently, treaty

⁸¹ *Mellet v. Ireland*, Communication No. 2324/2013, UN Doc. CCPR/C/116/D/2324/2013 (2016), para. 16 (Cleveland S, concurring) (HR Committee); Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned*, *supra* note 47, p. 13; Amnesty International, *Abortion Ban in El Salvador*, *supra* note 47.

⁸² *Working Group on the issue of discrimination against women in law and in practice*, UN Doc. A/HRC/32/44 (2016), para. 79.

⁸³ *L.C. v. Peru*, Communication No. 22/2009, UN Doc. CEDAW/C/50/D/22/2009 (25 November 2011), para 7.7 (CEDAW)..

⁸⁴ Liiri Oja & Alicia Ely Yamin, "Woman' in the European Human Rights System: How is the Reproductive Rights Jurisprudence of the European Court of Human Rights Constructing Narratives of Women's Citizenship?" (2016) 32(1) *Columbia Journal of Gender and Law*, p. 74.

⁸⁵ Anand Grover, *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc. A/66/254; *L.C. v. Peru*, *supra* note 83, para. 12(b); *Mellet v. Ireland*, *supra* note 81, para. 16; CRC Committee, *General Comment No. 15*,

monitoring bodies have progressed beyond just articulating specific grounds under which abortion should be legal and have instead urged states to generally ensure women access to safe abortion services. The Children’s Rights Committee, which monitors state compliance with the Convention on the Rights of the Child, recommends that “urges States to decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislation with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions.”⁸⁶ Furthermore, in its General Recommendation on women in conflict, the CEDAW Committee, which monitors states compliance with the Convention on the Elimination of Discrimination against Women, advises states to “ensure that sexual and reproductive health care includes access to... safe abortion services,”⁸⁷ without qualification concerning the legality of abortion.⁸⁸ International human rights bodies have also called on countries to release women imprisoned for having illegal abortions or miscarriages, and to ensure their access to justice and right to a remedy, an essential principle of the rule of law and a fundamental human right.⁸⁹

d. Public health impact

The health impact of criminalizing abortion is devastating. WHO has recognized that unsafe abortion, mostly occurring in countries with restrictive abortion laws, is one of the leading causes of maternal mortality worldwide. Unsafe abortion, accounts for roughly 13 percent of maternal mortalities, resulting in approximately 47,000 maternal death annually, worldwide.⁹⁰ In some countries, the percentage of maternal death resulting

para. 70, UN Doc. CRC/C/GC/15 (2013); HR Committee, Concluding Observations: Ireland, para. 9, UN Doc. CCPR/C/ IRL/CO/4 (2014); CEDAW, Concluding Observations: Bahrain, para. 42(b), UN Doc. CEDAW/C/BHR/CO/3 (2014); CAT, Concluding Observations: Paraguay, para. 22, UN Doc. CAT/C/PRY/CO/4-6 (2011); Human Rights Committee, Concluding Observations: Sierra Leone, para. 14, UN Doc CCPR/C/SLE/CO/1 (2014); CRC, Concluding Observations: Chad, para. 30, UN Doc. CRC/C/15/Add.107 (1999); Chile, para. 56, UN Doc. CRC/C/CHL/ CO/3 (2007); Costa Rica, para. 64(c), UN Doc. CRC /C/CRI/CO/4 (2011); Human Rights Committee, Concluding Observations: Guatemala, para. 20, UN Doc. CCPR/C/GTM/CO/3 (2012); CESCR, Concluding Observations: Dominican Republic, para. 29, UN Doc. E/C.12/DOM/CO/3 (2010); CESCR, Concluding Observations: Chile, UN Doc. E/C.12/1/Add.105 (2004), para. 53.

⁸⁶ CRC Committee, *General Comment No. 20*, UN Doc. CRC/C/GC/20 (2016), para. 60.

⁸⁷ CEDAW Committee, *General Recommendation No. 30*, UN Doc. CEDAW/C/GC/30 (2013), para. 52(c).

⁸⁸ This progressive trend is also visible in the CEDAW Committee’s recent concluding observations. See, e.g., CEDAW, Concluding Observations: New Zealand, UN Doc. CEDAW/C/NZL/CO/7 (2012), para. 35(a) (urging a state permitting abortion where pregnancy poses a risk to the woman’s physical or mental health and in instances of rape or incest to amend its abortion law “to ensure women’s autonomy to choose.”); *Sierra Leone*, UN Doc. CEDAW/C/SLE/CO/6 (2014), para. 32; See also CEDAW General Recommendation 35 on gender-based violence against women, updating general recommendation no. 19, recognizing violations of sexual and reproductive health and rights, which include denial of abortion as ‘forced continuation of pregnancy’, para.18, CEDAW/C/GC/35 (2017).

⁸⁹ CEDAW Committee, *General Recommendation No. 33*, UN Doc. CEDAW/C/GC/33 (2015); the recent prosecution of the case of Belén in Argentina concerning a woman charged with aggravated homicide for allegedly having an illegal issue a progressive concluding observation, calling on Argentina to consider abortion, when in fact, she miscarried, and was sentenced to 8 years in prison, directly influenced the Human Rights Committee to decriminalizing abortion, and calling for a review of her case with a view to her prompt release; Human Rights Committee, Concluding Observations: Argentina, UN Doc. CCPR/C/ARG/CO/5 (2016), paras. 11-12.

⁹⁰ World Health Organization (WHO), *Safe abortion: Technical and policy guidance for health systems* (2nd ed. 2012), pp. 23, 90, http://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241548434/en/

from unsafe abortion is much higher, accounting for more than 30 percent.⁹¹ Maternal morbidity due to unsafe abortion, is also prevalent. Approximately 5 million women are admitted to hospital as a result of unsafe abortion every year in developing countries. While more than 3 million women who have complications following unsafe abortion do not receive care.⁹² The World Health Organization (WHO) recognizes that in countries with restrictive abortion laws, induced abortion rates are high, most abortions are unsafe, jeopardizing their health and lives.⁹³ Legal restrictions on abortion do not reduce the likelihood that women facing an unplanned pregnancy will seek abortion services. Instead, they compel women to risk their lives and health by seeking out unsafe abortions. Where induced abortion is highly restricted or unavailable, "safe abortion has become a privilege of the rich, while poor women have little choice but to resort to unsafe providers."⁹⁴ WHO recognizes that "Almost every abortion death and disability could be prevented through sexuality education, use of effective contraception, provision of safe, legal induced abortion, and timely care for complications."⁹⁵

Recent cases also illustrate the harmful health impact that the chilling effect of restrictions and criminalization of abortion, and the stigma abortion carries even in countries with liberal laws. When a health service is so heavily restricted and regulated especially through the use of criminal law, it sets off a spiral effect which impacts access to a whole range of services and which can open up abuses by providers who exploit the situation or who are concerned about being criminally prosecuted. Health systems generally are also impacted, oftentimes by not providing the services at all or by denying training to health providers and procurements of necessary goods and services, such as emergency contraception or medical abortion. For example, women are being denied post abortion care for complications after undergoing an illegal abortion and pregnant women are dying because they were denied lawful abortion or other health services, based on concerns over harming the fetus or doctors fearing criminal prosecution for inducing an abortion.⁹⁶ The combined effect of this spiral is that women and girls continue to be denied their fundamental rights and subjected to large scale preventable mortality and morbidity.

3. Sex work

a. The nature and scope of the criminal law

Sex work is criminalized or otherwise punished through a variety of laws in approximately 116 countries globally.⁹⁷ Some countries criminalize both the buying and selling of sex, as well as the facilitation and other activities related to sex work. Some

⁹¹ See L. R. Airede & B. A. Ekele, "Adolescent maternal mortality in Sokoto, Nigeria", *Journal of Obstetrics and Gynaecology*, Volume 23, 2003 - Issue 2, <http://www.ncbi.nlm.nih.gov/pubmed/12745561>.

⁹² World Health Organization (WHO), *Preventing Unsafe abortion - fact sheet* (May 2016), <http://www.who.int/mediacentre/factsheets/fs388/en/>

⁹³ WHO, *Safe abortion: Technical and policy guidance for health systems*, *supra* note 90, p. 23.

⁹⁴ *Id.*, p.1.

⁹⁵ WHO, *Preventing Unsafe abortion - fact sheet*, *supra* note 92.

⁹⁶ *Working Group on the issue of discrimination against women in law and in practice*, *supra* note 82; *L.C. v. Peru*, *supra* note 83, para. 8.15; *Mellet v. Ireland*, *supra* note 81; *Case of Tysiac v. Poland*, *supra* note 75.

⁹⁷ UNDP, *Global Commission on HIV and the Law, Risks, Rights and Health* [hereinafter "Global Commission on HIV and the Law"] (2012), p. 37, <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>.

states' legal regimes purport to not criminalize sex workers themselves, but the clients of sex workers and third parties who facilitate sex work. There are also countries where other criminal and civil laws, not specifically related to sex work are used to punish sex workers.⁹⁸ The U.N. Special Rapporteur on health describes criminalization of sex work as including not only laws that are enacted to render certain conduct deserving of criminal punishment, but additionally, the use of pre-existing criminal laws against sex workers.⁹⁹ For example, police often use vague laws criminalizing "loitering," "public decency," "morality," or "nuisance" to harass and arrest sex workers.¹⁰⁰ In some contexts, police also discriminatorily profile people as sex workers based on characteristics such as race, class, gender identity, and sexual orientation.¹⁰¹

Additionally, many governments do not directly criminalize the exchange of sex for remuneration, but rather criminalize all surrounding activities, including soliciting or "brothel-keeping" (at times defined as two or more sex workers operating together), thus making it impossible for sex workers to avoid breaking a law.¹⁰² Laws criminalizing "third parties"¹⁰³ can also create a criminalized environment for sex workers by targeting those who provide support or security, or even by targeting sex workers who work together.¹⁰⁴

Often countries have absent or inadequate programs to help people who want to leave sex work and in some jurisdictions, anti-trafficking laws, policies, and programs are misused to detain people they perceive to be/are sex workers, in the name of assisting them as victims of trafficking.¹⁰⁵

⁹⁸ Amnesty International, *The human cost of "crushing" the markets: criminalization of sex work in Norway* [hereinafter "Amnesty International, *criminalization of sex work Norway*"] (2016), pp. 39-40, http://www.amnestyusa.org/sites/default/files/norway_report_-_sex_workers_rights_-_embargoed_-_final.pdf

⁹⁹ Anand Grover, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/HRC/14/20 (2010), para. 1,

¹⁰⁰ Yugank Goyal & Padmanabha Ramanujam, *Ill-conceived Laws and Exploitative State: Toward Decriminalizing Prostitution in India*, AKRON L. R., 1074, 75 (2015).

¹⁰¹ For example, Amnesty International, *What I'm Doing Is Not A Crime*, *the Human Cost of Criminalizing Sex Work in the City of Buenos Aires, Argentina* [hereinafter "Amnesty International, *Criminalizing Sex Work in the City of Buenos Aires*"] (2016), <http://www.amnestyusa.org/research/reports/what-i-m-doing-is-not-a-crime-the-human-cost-of-criminalizing-sex-work-in-the-city-of-buenos-aires-a>. Police in the U.S. often profile transgender women of color as sex workers. Frank H. Galvan & Mohsen Bazargan, *Bienestar, Interactions of Latina Transgender Women With Law Enforcement* (2012), pp. 1, 10, <http://escholarship.org/uc/item/62p795s3#page-1>; Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* (2005), p. 18, <https://www.amnesty.org/en/documents/AMR51/122/2005/en/>.

¹⁰² See, e.g., Jane Pitcher & Marjan Wijers, *Impact of Different Regulatory Models on the Labour Conditions, Safety and Welfare of Indoor-Based Sex Workers*, 14 *CRIMINOLOGY & CRIMINAL JUSTICE* 549, 554-59 (2014), <https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/14539/3/Pitcher%20Wijers%20Impact%20regulatory%20models%20CCJ%20Apr%202014.pdf>.

¹⁰³ Amnesty International defines a "third party" as: "Individuals who assist with facilitating the sale and purchase of sex. Distinctions are often made between exploitative third parties and those who provide support services to sex workers (for example, security guards, secretaries, advertisers) at their request." (see <https://www.amnesty.org/en/documents/amr13/4042/2016/en/>)

¹⁰⁴ Amnesty International, *Criminalizing Sex Work in the City of Buenos Aires*, *supra* note 101. pp. 19-20.

¹⁰⁵ Id.; Thaddeus Gregory Blanchette & Ana Paula da Silva, "Bad Girls and Vulnerable Women" in Carisa R. Showden & Samantha Majic eds., *Negotiating sex work* (2014), pp. 121-144, 139; Best

b. Justifications for the criminal law

The drives underlying criminalization of sex work and state control over sex workers generally fall into two categories: moral aversion to sex work, and a belief that sex work is inherently victimizing for those selling sex. Justifications have also been based on discourses that link immorality and disease; criminalization of sex work is needed to control the spread of sexually transmitted infections. Conflation of trafficking and sex work also appears in justifications for various criminalization policies.

For example, the public presence of sex workers has been described as “an affront [to] the sense of decency of the ordinary citizen,”¹⁰⁶ or as “adversely affect[ing] the neighborhoods where they exist,”¹⁰⁷ or “damag[ing] the dignity and morality of ... society.”¹⁰⁸ Religious moral opposition to sex work has played a key role in slowing or hindering recent efforts to change government policies that would lift criminal sanctions on sex workers.¹⁰⁹

Underlying many of these justifications is the assertion that sex be reserved for procreation, committed relationships or marriage. This results in stereotypes of people who engage in sex outside of these conditions and/or outside of marriage or monogamous relationships (including paid and unpaid sex between consenting adults), as immoral, reckless, risky and irresponsible. Female sex workers, in particular, are labeled promiscuous and immoral, running counter to the sex role stereotype that women should be sexually passive, chaste and modest. This stereotype can be further compounded by one’s migrant status, gender identity, sexual preferences, race or ethnicity.¹¹⁰ Another stereotype maintains that women are weak and fragile, incapable of making rational decisions, including with regard to consensual sexual activity. This stereotype infers that women are vulnerable to exploitation, including in the context of consensual sex work,

Practices Policy Project, HR Committee Questions U.S.’s Criminalization of Sex Workers as Method to Fight Trafficking, (Mar. 28, 2014), <http://www.bestpracticespolicy.org/2014/03/28/un-human-rights-committee-questions-u-s-s-criminalization-of-sex-workers-as-method-to-fight-trafficking/>.

This has included detention of arrestees in squalid state-run shelters that amount to jails. Human Rights Watch, *Off the Streets: Arbitrary Detention and Other Abuses Against Sex Workers in Cambodia* [hereinafter “Human Rights Watch, *Off the Streets*”] (2010), pp. 6-7, https://www.hrw.org/sites/default/files/reports/cambodia0710webwcover_2.pdf.

¹⁰⁶ Annie Hill, “Demanding Victims: The Sympathetic Shift in British Prostitution Policy”, in Carisa Showden & Samantha Majic, eds., *Negotiating sex work* (2014), pp. 77-93, 81.

¹⁰⁷ Penelope Saunders & Jennifer Kirby, “Move Along: Community-based Research into the Policing of Sex Work in Washington, D.C.” in *Social Justice* Vol. 37, No. 1 (119), Sexuality, Criminalization and Social Control Action Research (2010-11), pp. 107-127,

https://www.jstor.org/stable/41336938?seq=1#page_scan_tab_contents

¹⁰⁸ Human Rights Watch, *Off the Streets*, *supra* note 105, p.28.

¹⁰⁹ Joyce Outshoorn, “The Contested Citizenship of Sex Workers: The Case of the Netherlands”, in Carisa Showden & Samantha Majic, eds., *Negotiating sex work* (2014), pp. 171-193, 173.

¹¹⁰ See e.g., Amnesty International, *Criminalization of Sex Work in Norway*, *supra* note 98, p. 87; *Petition for Constitutional Review of the Act on the Punishment of Intermediating in Sex Trade and Associated Acts Article 21 Paragraph 1* Decision number: 2013 헌가 2 (2013HeonGa2) (2016) (South Korea, Constitutional Court).

and in need of strong state protection. This conception works hand-in-hand with the sex stereotype of men having uncontrollable sexual desires, which lead to sexual stereotypes of men as violent.

c. Human rights considerations

Numerous human rights are implicated when criminalizing sex work, including the right to privacy, to security of the person, to freedom from torture and other cruel, inhuman and degrading treatment or punishment, to the right to health, to adequate housing, to just and favorable conditions of work, to freedom of expression and to equality and non-discrimination. While there is a wide range of human rights implicated, human rights bodies, primarily the Committee on the Elimination of Discrimination Against Women (CEDAW) have generally addressed the criminalization of sex work in the context of violence against sex workers, the disparate impact of criminal laws on sex workers as opposed to clients or third parties, and the impact of punitive regulation on sex workers' right to health.

In CEDAW's General Recommendation 33 (on women's access to justice), the Committee calls for states to abolish "discriminatory criminalization, and review and monitor all criminal procedures to ensure that they do not directly or indirectly discriminate against women", having expressed concern that "[w]omen are also disproportionately criminalized due to their situation or status, for instance women in prostitution."¹¹¹

The CEDAW Committee, in its General Recommendation 19 (violence against women), specifically recognizes the vulnerability of sex workers to human rights violations and violence, resulting from their marginalization and unlawful legal status.¹¹² It calls on states to report on their efforts to prevent violence against women who sell sex and to ensure they enjoy "the equal protection of law against rape and other forms of violence."¹¹³ In relation to this, CEDAW has called on governments to respect the human rights of people engaged in sex work, and to repeal laws criminalizing sex workers, and other overly broad criminal laws such as solicitation and disorderly conduct, to stop criminally prosecuting and punishing sex workers, to release women from prison serving sentences for prostitution, and has raised concerns over "the limited availability of programmes for women who wish to leave prostitution" and recommending strengthening "the assistance provided to women and girls who wish to leave prostitution, including by providing alternative income-generating opportunities."¹¹⁴ While on a few occasions

¹¹¹ CEDAW, *General Recommendation No. 33*, UN Doc. CEDAW/C/GC/33 (2015), paras. 5(i) and 49)

¹¹² CEDAW, *General Recommendation No. 19*, UN Doc. A/47/38 (1992), para. 15.

¹¹³ *Id.* para. 19.

¹¹⁴ See, for example, CEDAW, *Concluding Observations: Malawi*, UN Doc. CEDAW/C/MWI/CO/7 (2015), para. 25(f)(g); CEDAW, *Concluding Observations: Albania*, UN Doc. CEDAW/C/ALB/CO/3 (2010), para. 29; CEDAW, *Concluding Observations: Iraq*, UN Doc. CEDAW/C/IRQ/CO/4-6 (2014), para. 32 (d)(e); CEDAW, *Concluding Observations: France*, UN Doc. CEDAW/FRA/CO/6 (2008), paras. 30, 31; CEDAW, *Concluding Observations: China (including mainland China, Hong Kong and Macau)*, UN Doc. CEDAW/C/CHN/CO/6 (2006), paras. 19 and 20; CEDAW, *Concluding Observations: China*, UN Doc. CEDAW/C/CHN/CO/7-8 (2014), para. 28; CEDAW, *Concluding Observations: Sweden*, UN Doc. CEDAW/C/SWE/CO/8-9 (2016), paras. 28, 29. See also Amnesty International, *Explanatory note on Amnesty International's policy on State obligations to respect, protect and fulfil the human rights of sex workers* [hereinafter "Amnesty International, *Explanatory note*"] (2016), Index: Pol 30/40632016, <https://www.amnesty.org/en/documents/pol30/4063/2016/en/>

CEDAW has expressed support for criminalizing clients,¹¹⁵ it has generally made clear that, in line with the Convention text, criminal sanctions should be reserved for those who profit from the "exploitation of prostitution."¹¹⁶ The Committee has noted that only imposing criminal penalties on sex workers "entrenches sexual exploitation of women."¹¹⁷ The Human Rights Committee has also addressed violence against sex workers, including by the police force.¹¹⁸

In some Concluding Observations, CEDAW has addressed violations against sex workers in the context of trafficking, to some extent conflating the issues.¹¹⁹ This approach implies that sex work cannot be consensual, denying sex workers agency and autonomy over their bodies. The CESCR Committee, while not addressing sex work extensively, has called on governments to decriminalize adult consensual sexual activities and to adequately address trafficking for both labor and sexual exploitation, and has made a distinction between sex work and trafficking.¹²⁰

In relation to the right to favorable and just working conditions and the right to health, CEDAW has called to address discrimination against sex workers in healthcare, including compulsory HIV testing and other services, recognizing that criminalization of sex workers increases the vulnerability of those most at risk of HIV.¹²¹

UN Special Procedures have also given their attention to the human rights impact of criminalizing sex work. For example, the UN Special Rapporteur on the right to health has

¹¹⁵ See, for example, CEDAW, Concluding Observations: Norway, UN Doc. CEDAW/C/NOR/CO/8 (2012).

¹¹⁶ See CEDAW, Concluding Observations: Fiji, UN Doc. A/57/38 (2002), paras. 64-65; CEDAW, Concluding Observations: Hungary, UN Doc. A/57/38 (2002), paras. 323-324; CEDAW, Concluding Observations: Kenya, UN Doc. CEDAW/C/KEN/CO/6 (2007), paras. 29-30; CEDAW, Concluding Observations: Republic of Korea, UN Doc. CEDAW/C/KOR/CO/6 (2007), paras. 19-20; CEDAW, Concluding Observations: France, UN Doc. CEDAW/FRA/CO/6 (2007), paras. 30-31; CEDAW, Concluding Observations: Germany, UN Doc. CEDAW/C/DEU/CO/6 (2009), paras. 49-50; CEDAW, Concluding Observations: Japan, UN Doc. CEDAW/C/JPN/CO/6 (2009), para. 39; CEDAW, Concluding Observations: Albania, UN Doc. CEDAW/C/ALB/CO/3 (2010), para. 29.

¹¹⁷ CEDAW, Concluding Observations: Lithuania, UN Doc. A/55/38 (2000), para. 152; Armenia, UN Doc. CEDAW/C/ARM/CO/4/Rev.1 (2009), para. 27 (addressing administrative penalties imposed on sex workers); Egypt, UN Doc. CEDAW/C/EGY/CO/7 (2010), para. 25 (expressing concern that women in prostitution are punished, as opposed to clients and increases their vulnerability to violence). See also, CEDAW, *Report of the inquiry concerning Canada under article 8 of the Optional Protocol to CEDAW*, UN Doc. CEDAW/C/OP.8/CAN/1 (2015), para. 120.

¹¹⁸ HR Committee, Concluding observations: Cambodia, UN Doc. CCPR/C/KHM/CO/2 (2015); HR Committee, Concluding observations: Namibia, UN Doc. CCPR/C/NAM/CO/2 (2016), para. 21. The HR Committee has raised concerns about arbitrary arrests and detentions and rape of sex workers, including by the police force. It encouraged at least one government Government to "[e]nsure that sex workers can report crimes without risking being prosecuted for their occupation and that they can participate in opt-out schemes" HR Committee, *Concluding Observations: Namibia*, UN Doc. CCPR/C/NAM/CO/2 (2016), para. 22.

¹¹⁹ Amnesty International, *Explanatory note*, *supra* note 114, pp.28-31.

¹²⁰ CESCR General Comment 22 on the right to sexual and reproductive health, paras 40 and 57, UN Doc. E/C.12/GC/22 (2016); CESCR, Concluding observations: Albania, UN Doc. E/C.12/ALB/CO/2-3 (2013).

¹²¹ See, CEDAW, Concluding Observations: Hungary, UN Doc. CEDAW/C/HUN/CO/7-8 (2013), para.23 (e).

explicitly called for the decriminalization of sex work and for existing domestic labor laws, occupational health and safety laws, social insurance schemes and other protections to be extended to sex workers, including irregular migrant workers.¹²² The UN Special Rapporteur on torture has expressed concern about the compulsory detention of sex workers in so-called rehabilitation centers and observed: “[b]reaches of privacy and confidentiality are a further indignity experienced by sex workers in health settings.”¹²³ In her report on stigma, the Special Rapporteur on the rights to water and sanitation also addressed discrimination against sex workers, recognizing criminalization as the foundation of the stigma that results in, among other rights abuses, the denial of access to services, including a safe water supply and sanitation.¹²⁴ The Special Rapporteur on extreme poverty and human rights has also identified the linked issues of criminalization and stigma as barriers to the effective realization of the human rights of sex workers, calling it a failure “to provide all persons equal and effective protection of the law and take measures to prevent and combat indirect systemic discrimination on the form of legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups in the enjoyment of their rights.”¹²⁵

The U.N. Special Rapporteur on violence against women explains the parameters of decriminalization in the context of sex work, “decriminalization with a human rights approach calls for the protection of the legal rights of sex workers. Thus, it calls for decriminalization of prostitution and related acts, and the application of existing human rights and labour rights to sex workers[.]”¹²⁶

d. Public health impact

U.N. agencies and other expert bodies, have found that laws criminalizing sex work worsen health outcomes for sex workers, determining that a harm reduction approach is necessary to protect the health rights of people engaged in sex work and call for the decriminalization of sex work, more comprehensively than just decriminalizing sex workers.¹²⁷ For example, the Global Commission on HIV and the Law issued guidance that

¹²² Anand Grover, *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc. A/HRC/14/20 (2010), paras. 46-50. See also, UN Doc. A/HRC/23/41 (2013), para. 76(j).

¹²³ Juan Méndez, *Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/22/53 (2013), paras. 40, 75. The Special Rapporteur on violence against women has also expressed concern about the use of forcible detention and rehabilitation against sex workers: Rashida Manjoo, *Special Rapporteur on violence against women, its causes and consequences, Mission to India*, UN Doc. A/HRC/26/38/Add.1 (2014), para. 78(e). The discrimination exhibited by health-care workers towards sex workers was also raised as a concern by the previous Special Rapporteur on the right to health. Paul Hunt, *Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Mission to Romania*, UN Doc. E/CN.4/2005/51/Add.4 (2005), para 4.2.

¹²⁴ Catarina de Albuquerque, *Special Rapporteur on the human right to safe drinking water and sanitation*, UN Doc. A/HRC/21/42 (2012).

¹²⁵ Magdalena Sepúlveda, *Special Rapporteur on extreme poverty and human rights, Mission to Namibia*, UN Doc. A/HRC/23/36/Add.1 (2013), para. 53.

¹²⁶ Radhika Coomaraswamy, *Special Rapporteur on violence against women, its causes and consequences*, UN Doc. E/CN.4/2000/68 (2000), para. 21.

¹²⁷ See, for example, UNAIDS Strategy 2011-2015, “Getting to Zero” (2010), p. 7, http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2010/20101221_JC2034E_UNAIDS-Strategy_en.pdf; UNAIDS updated Guidance Note on HIV and Sex Work

called for decriminalizing consensual adult sex work and repeal other laws that prohibit consenting adults to buy or sell sex.¹²⁸ Its report recommended that "[r]ather than punish[] consenting adults involved in sex work, countries ... ensure safe working conditions and offer sex workers and their client's access to effective HIV and health services and commodities."¹²⁹ It also clarified that laws against human trafficking "must be used to prohibit sexual exploitation and they must not be used against adults involved in consensual sex work."¹³⁰ Evidence demonstrates that decriminalization fosters positive health outcomes amongst sex workers, while criminalization creates conditions that harm sex workers' health. Where police can make use of criminal laws to arrest or harass sex workers, sex workers are driven underground, and are less likely to seek health care they need and have a right to access and makes it harder for health outreach workers to reach them.¹³¹ Research published in *The Lancet* confirmed that of all potential interventions identified, "[d]ecriminalization of sex work would have the greatest effect on the course of HIV epidemics across all settings, averting 33–46% of HIV infections in the next decade."¹³² The HIV prevalence among sex workers is 12 times greater than among the general population.¹³³ WHO asserts that to effectively respond to this, sex workers must be meaningfully involved in leading creation of solutions to ensure they have access to treatment and prevention services free from discrimination or other harm.¹³⁴

4. Adultery

a. The nature and scope of the criminal law

Fifty countries reinforce traditional prohibitions on adultery, any sexual relations outside of marriage, by criminalizing it.¹³⁵ Many laws criminalizing adultery expressly discriminate between women and men in terms of defining the crime or the punishments imposed for committing adultery, usually targeting women, while others are gender neutral. For example, in some of these laws, adultery is defined as consensual sexual intercourse

(2009) and additional Annexes to the Guidance Note in 2012. See also UNAIDS, *On the fast-track to end AIDS: UNAIDS 2016–2021 Strategy*, p. 64, www.unaids.org/sites/default/files/media_asset/20151027_UNAIDS_PCB37_15_18_EN_rev1.pdf ("Evidence-informed analyses also indicate that decriminalization of sex work could prevent people from acquiring HIV through combined effects on violence, police harassment, safer work environments and HIV transmission pathways."); UNAIDS, *Commission on AIDS in Asia, Redefining AIDS in Asia: creating an effective response* (2008), http://data.unaids.org/pub/Report/2008/20080326_report_commission_aids_en.pdf; UNDP, *Global Commission on HIV and the Law*, [supra](#) note 97; World Health Organization (WHO), *Prevention & treatment of HIV and other sexually transmitted infections for sex workers in low and middle countries* [hereinafter "WHO, Prevention & treatment of HIV"] (2012), http://www.who.int/hiv/pub/guidelines/sex_worker/en/

¹²⁸ UNDP, *Global Commission on HIV and the Law*, [supra](#) note 97, p. 43.

¹²⁹ [Id.](#)

¹³⁰ [Id.](#)

¹³¹ Amnesty International, *Explanatory note*, [supra](#) note 114; Amnesty International, *Criminalizing Sex Work in the City of Buenos Aires*, [supra](#) note 101; Human Rights Watch, *Off the Streets*, [supra](#) note 105, p. 23.

¹³² K. Shannon, et al., 'Global epidemiology of HIV among female sex workers: Influence of structural determinants', *The Lancet*, 2014, p. 10, [dx.doi.org/10.1016/S0140-6736\(14\)60931-4](http://dx.doi.org/10.1016/S0140-6736(14)60931-4)

¹³³ J. Vandepitte, et. al., *Estimates of the number of female sex workers in different regions of the world*, 82 SEXUALLY TRANSMITTED INFECTIONS 3 (2006), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2576726/>.

¹³⁴ WHO, *Prevention & treatment of HIV*, [supra](#) note 127, pp. 16, 20, 37.

¹³⁵ Fordham University, *Study on adultery* (2015) (commissioned by and on file with OHCR)

between a married woman and a man who is not her husband, targeting married women.¹³⁶ In some states, pregnancy outside of marriage constitutes sufficient evidence to enable a woman to be convicted of adultery, targeting women'.¹³⁷ However, even in countries with gender neutral laws, they are still overwhelmingly conceptually directed and enforced against women and girls.¹³⁸ Under many penal systems which define adultery as a crime there is a harsher penalty for women than for men who commit adultery.¹³⁹

The criminalization of adultery also has ripple effects, impacting other crimes dealing with violence against women, such as rape and so called 'honor crimes'. So called 'honor crimes' are closely related to the criminalization of adultery, as some States allow a husband to kill his wife as a result of learning of her adultery and obtain an acquittal or mitigated sentence based on the justification of defending his or the family's honor.¹⁴⁰ Such laws pose a danger for victims of rape, who may be charged with and punished for adultery (or, more generally, a moral crime) when they are unable to meet the often stringent evidence requirements of sexual assault¹⁴¹ or in places where the law does not distinguish between sexual assault and other extramarital sex. This discourages women from reporting rape in fear of being prosecuted for a moral crime.¹⁴²

In some countries, the crime is severely punished, oftentimes by courts, and may even result in death by stoning.¹⁴³ Stoning is a method of capital punishment primarily used

¹³⁶ See CEDAW, Concluding observations: Thailand, UN Doc. CEDAW/C/THA/CO/5 (2006), (With regard to divorce, whereas adultery committed by wife constitutes grounds for divorce, a married man may have sexual intercourse with other women); CESCR, Concluding observations: DRC, UN Doc. E/C.12/1/ADD.45 (2000), (marriage and family laws overtly discriminate against women (for instance, adultery is illegal for women but, in certain circumstances, not for men).

¹³⁷ See Radhika Coomaraswamy, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. E/CN.4/2003/75/Add.2 (2003).

¹³⁸ Working Group on Discrimination against women in law and in practice, *Background note on statement on adultery*, <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E>

¹³⁹ CEDAW, Concluding observations: DRC, UN Doc. CEDAW/C/COG/CO/6 (2012), (the Committee expressed concern regarding the disproportionate sanction applied to women in case of adultery (penal code, arts. 336 and 337)); CEDAW, Concluding observations: Kuwait, UN Doc. CEDAW/C/KWT/CO/3-4 (2011), (the Committee expressed concerns about the so-called "honour crimes" and the extremely lenient penalties those acts attract under article 153 of the criminal code. Under that article, men suspected of murder for adultery can face a penalty of up to three years in prison or a fine of up to 3,000 rupees, as compared to women, who can receive a life sentence.

¹⁴⁰ Radhika Coomaraswamy, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. E/CN.4/2002/83 2002, para 34 (discussing honor crimes in Brazil and Muslim countries); see also Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/20/16 (2012), para. 95 ("[The Penal Code of Afghanistan] mitigates penalties for murder if the victim is a close relative caught in the act of committing adultery, and the killing was not premeditated.").

¹⁴¹ *Id.*

¹⁴² HR Committee, Concluding observations: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1 (2007), para. 14(b).

¹⁴³ See, for example, CRC, Concluding observations: Pakistan, UN Doc. CRC/C/PAK/CO/3-4 (2009), (High percentage of women and girls in jails awaiting trials for adultery-related offences and at the imposition, by parallel judicial systems, of sentences like whipping, amputation and stoning amounting to torture or cruel, inhuman or degrading treatment); CAT, Concluding observations: Yemen, CAT/C/YEM/CO/2/Rev.1 (2010), (The majority of women in prison have been sentenced for prostitution, adultery, alcoholism, unlawful or indecent behaviour, in a private or public setting, as well as for violating restrictions of movement imposed by family traditions and Yemeni laws; such

for crimes of adultery and other related offences linked to so called 'honor', of which women are disproportionately found guilty. This has resulted in 23 joint communications by U.N. Special Procedures mandate holders sent between 2004 and 2011, in respect of more than 30 women sentenced to death by stoning. Other communications relate to honor crimes committed by family members or to the action/inaction of the State with regard to flogging or death by hanging of women for suspected premarital sex, for adultery, for failing to prove rape, and for acts deemed incompatible with chastity.¹⁴⁴

b. Justifications for the criminal law

States often justify criminal adultery laws as protecting innocent spouses and preserving family stability, promoting the culture, religion or morality of a society. Such laws reinforce religious and cultural notions of the sanctity of marriage and family through treating women as the sexual property of men, and condemning them for what is deemed as promiscuous, transgressing notions of acceptable sexual behaviour for women. Underlying these laws are stereotypes that women are, or should be, sexually passive and chaste.¹⁴⁵ States also justify penalizing adultery based on misconceptions that it will prevent the spread of HIV or other sexually transmitted infections –which women are blamed for spreading.

The UN Working Group on Discrimination Against Women has recognized that “*some States adopt national laws and regulations that restrict the rights, power and mobility of women on the basis of essentialist points of view belonging to a particular culture or religion*”, noting the underlying “*patriarchal oppression of women*” which underlies adultery laws.¹⁴⁶

c. Human rights considerations

UN human rights bodies have consistently noted that criminalization of sexual relations between consenting adults, including adulterous ones, is a violation of their right to privacy, the right to sexual and reproductive health, and the right to be free from discrimination, amongst other rights, and have called on states to repeal such laws.¹⁴⁷

sentences are applied in a discriminatory way against women). See generally The UN Working Group on Discrimination against women in law and in practice, *Background note on Adultery*, *supra* note 138.

¹⁴⁴ Rashida Manjoo, *Special Rapporteur on violence against women on the killing of women*, UN Doc. A/HRC/20/16 (2012), paras. 45-46.

¹⁴⁵ Rebecca Cook. and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, 2010, p. 27. Stereotyping women as the sexual property of men also enables sexual exploitation of women, with women’s consent to sex being questioned. See also, OHCHR, *Report on Discrimination and violence against individuals based on their sexual orientation and gender identity*, *supra* note 61.

¹⁴⁶ *Working Group on the issues of discrimination against women in law and in practice*, UN Doc. A/HRC/29/40 (2015), paras 19 and 73(c) (v).

¹⁴⁷ CESCR, *General Comment No. 22*, UN Doc. E/C.12/GC/22 (2016), para. 40; Working Group on Discrimination against Women in law and in practice, UN Doc. A/HRC/29/40 (2015), paras 19, 49 and 73(2015); Statement of the UN Working Group on Discrimination against Women in law and in practice, “Adultery as a criminal offence violates women’s human rights”, <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E#sthash.Bhunixgb.dpuf>

The CEDAW Committee, the Human Rights Committee and the CESCR Committee have consistently called for the repeal of discriminatory legislation, including on adultery.¹⁴⁸

Various UN human rights bodies have recognized this negative impact and found that existing human rights treaties prohibit adultery laws that expressly discriminate against women or disproportionately impact women in practice. They have noted that enforcement of such laws leads to discrimination and violence against women.¹⁴⁹

UN treaty monitoring bodies have called upon States to “eliminate the inconsistencies in the legal frameworks...by repealing discriminatory provisions against women...by providing consistent definitions and sanctions, related to, inter alia, rape... [and] adultery.”¹⁵⁰ UN Special Mechanisms such as the Special Rapporteur on violence against women (SRVAW) have admonished States’ unwillingness to respond to violence perpetrated against women as a result of adultery criminalization¹⁵¹ and those that use religion to justify their actions.¹⁵² Under international law, honor crimes are “harmful

¹⁴⁸ CEDAW, Concluding observations: Yemen, UN Doc. CEDAW/C/YEM/CO/6 (2009); CEDAW, Concluding observations: Uganda, UN Doc. A/57/38(SUPP) (The Committee expressed concern about the continued existence of legislation, customary laws and practices on inheritance, land ownership, widow inheritance, polygamy, forced marriage, bride price, guardianship of children and definition of adultery that discriminate against women and conflict with constitution and CEDAW); Human Rights Committee, Concluding observations: Sudan, UN Doc. CCPR/C/SDN/CO/3 (2007) (The Committee recommended that Sudan review its legislation, in particular articles 145 and 149 of the 1991 criminal code, so that women are not deterred from reporting rapes by fears that their claims will be associated with the crime of adultery); CEDAW, Concluding observations: Burundi, UN Doc. CEDAW/C/BDI/CO/4 (2008), (the Committee recommended the amendment of the provisions that (...) establish discrimination with regard to adultery (article 3 of the penal code); Human Rights Committee, Concluding observations: Venezuela, UN. Doc. CCPR/CO/71/VEN (2001) (The Committee recommended that Venezuela comply with obligations arising from articles 2, 3 and 26 of the ICCPR, amend all laws that still discriminate against women including those relating to adultery and ban on marriage for 10 months following dissolution of previous marriage); CESCR, Concluding observations: Philippines, UN Doc. E/C.12/PHL/CO/4 (2008) (The Committee stressed that the State party has not made sufficient progress in reviewing and repealing discriminatory provisions against women still existing in national legislation. Marital infidelity bill, which seeks to remove the discriminatory provisions in the revised criminal code pertaining to “concubinage” and “adultery”, has not yet been adopted).

¹⁴⁹ Working Group on Discrimination against women in law and in practice, *Background note on Adultery*, *supra* note 138; CEDAW, Concluding observations: Congo, UN Doc. A/58/38 (2003), paras. 160, 182; CEDAW, Concluding observations: Côte d’Ivoire, UN Doc. CEDAW/C/CIV/CO/1-3 (2011), para. 43; CEDAW, Concluding observations: Mexico, UN Doc. CEDAW/C/MEX/CO/7-8 (2012).

¹⁵⁰ See CEDAW, Concluding observations: Mexico, UN Doc. CEDAW/C/MEX/CO/7-8 (2012).

¹⁵¹ See Yakin Ertürk, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/11/6/Add.5 (2009), para. 98 (“Many of the communications to governments by the mandate holders have been in relation to honour crimes committed by family members, or to the action/inaction of the State with regard to stoning, flogging or death by hanging of women for suspected (...) adultery, for failing to prove rape, and for acts deemed incompatible with chastity”).

¹⁵² Rashida Manjoo, *Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/29/27/Add.5 (2015), art. 29 (“Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of the present Convention, culture, custom, religion, tradition or so-called ‘honour’ shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.”); See also, Yakin Ertürk, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/11/6/Add.5 (2009), para. 105. (discussing SRVAW’s critical stance against State-supported “hegemonic interpretations of religion to debunk cultural relativism” in order to sanction discriminatory and violent acts against women).

practices” that must be prevented, responded to, and eliminated.¹⁵³ Allowing these acts to go unpunished is a serious violation of international law.¹⁵⁴

d. Public health impact

In jurisdictions where extramarital or premarital sexual behavior is criminalized, people who engage in such conduct are unable to access needed health services, including contraceptives, STI treatment or safe, legal abortion services, with detrimental effects on their health. This is particularly the case for women.¹⁵⁵ Many laws criminalizing adultery are clearly associated either with negative health outcomes (e.g. the penalization of adultery through flogging or even the death penalty) or with violations of human rights (e.g. the exclusion of unmarried people from receiving information and services related to contraception) or, most frequently, both.¹⁵⁶

Honor killings remain underreported and under documented globally, hence the health impact of attempts are hard to measure. However, the United Nations Population Fund (UNFPA) has estimated that at least 5,000 women globally are murdered by family members each year in honor killings.¹⁵⁷ Honor killings take many forms, including direct murder; stoning; women and young girls being forced to commit suicide after public denunciations of their behavior; and women being disfigured by acid burns, sometimes leading to death.

5. HIV non-disclosure, exposure and transmission

a. The nature and scope of the criminal law

In all regions of the world, there have been cases of prosecution of people living with HIV who allegedly do not disclose their HIV status prior to sex (HIV non-disclosure), are perceived to expose others to HIV (HIV exposure) and/or are thought to have transmitted HIV to others (HIV transmission).¹⁵⁸ Recent research by civil society estimates that some 72 countries have laws that specifically allow for the criminalisation

¹⁵³ See CEDAW and CRC, *Joint General Recommendation/General Comment No. 31 / No. 18*, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014).

¹⁵⁴ Human Rights Committee, *General Comment No. 28*, UN Doc. CCPR/C/21/Rev.1/Add.10 (2000).

¹⁵⁵ WHO, *Sexual health, human rights and the law*, supra note 62, p. 10.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*, p. 41.

¹⁵⁸ Edwin J Bernard and Sally Cameron, *Advancing HIV Justice 2: Building momentum in global advocacy against HIV criminalization* (2016), HIV Justice Network and GNP+, Brighton/Amsterdam, http://www.hivjustice.net/wp-content/uploads/2016/05/AHJ2.final2_.10May2016.pdf. While many of these laws and cases are focused on otherwise consensual sexual intercourse, laws and cases also include (offering or supplying) sex work whilst living with HIV, and minor assaults such as spitting, biting and scratching. Women living with HIV have also been prosecuted for breastfeeding (including breastfeeding an infant that was not their own child) and incarcerated for longer because they were pregnant.

of HIV non-disclosure, exposure or transmission.¹⁵⁹ In addition to HIV-specific offences, many countries allow HIV criminalisation under existing general criminal law provisions.

Over the past 15 years there has been a significant increase in the number of countries using criminal laws and other civil sanctions to punish people for HIV transmission and exposure. In the mid-1990s, only a small number of countries, including Australia, Canada, Germany and the USA, had used the law in this way.¹⁶⁰ Prosecutions for HIV non-disclosure, exposure or transmission have now been reported in 61 countries.¹⁶¹ At least 313 arrests, prosecutions and/or convictions in 28 countries were reported between April 2013 and October 2015.¹⁶²

Many of these laws and/or their application are overly broad, contrary to key criminal law principles of legality, foreseeability, intent, causality, proportionality and proof. Thirty sub-Saharan African countries have now enacted overly broad and/or vague HIV-specific criminal statutes.¹⁶³ As recommended by UNAIDS and UNDP, concerns raised by the overly broad criminalization of HIV non-disclosure, exposure and transmission can be addressed, in part, by limiting the application of criminal law to cases of *intentional transmission* (i.e. where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it).¹⁶⁴

b. Justifications for the criminal law

The fear, misconceptions and other concerns relating to the growing HIV epidemic have led to calls on legislators to adopt provisions to criminalise individuals who are perceived to place others at risk of HIV infection or to apply laws of a general nature to this context. Several sets of arguments are often highlighted to justify the calls for criminalising HIV non-disclosure, exposure and transmission. First, the criminal law is considered to be a structural intervention that can contribute to reducing new HIV infections by deterring those who are considered to engage in behaviour that place others at risk of HIV infection. Second, some proponents of the criminalisation of HIV non-disclosure, exposure and transmission argue that it is necessary to support and protect the 'victims', including women and girls who, in many contexts, are vulnerable to the risk of HIV infection due to unequal power relations, particularly manifested in violence against women. This argument is commonly used in sub-Saharan Africa where HIV prevalence among young women and adolescent girls is very high. Third, criminalization of HIV non-disclosure, exposure and transmission is considered to be an appropriate and valid state response to punish the 'perpetrator' for their 'moral blameworthiness' and the 'harm' that it caused to others particularly in cases where HIV transmission occurs. This argument is based on the retributive role of the criminal law and is also linked with the

¹⁵⁹ *Id.*

¹⁶⁰ GNP+, 2010 *Global criminalization scan report* (2010), http://www.gnpplus.net/assets/wbb_file_updown/2045/2010_Global_Criminalisation_Scan.pdf

¹⁶¹ Bernard and Cameron, *supra* note 158, p. 11.

¹⁶² The highest numbers of cases during this period were reported in: Russia (at least 115); United States (at least 104); Belarus (at least 20); Canada (at least 17); France (at least 7); United Kingdom (at least 6); Italy (at least 6); Australia (at least 5); and Germany (at least 5). Bernard and Cameron, *supra* note 158, p. 12.

¹⁶³ *Id.*, p. 13.

¹⁶⁴ UNAIDS, *Ending Overly Broad Criminalisation*, *supra* note 47.

belief that removing from society those people who expose others to the risk of HIV would further contribute to incapacitate them from further transmitting HIV.

c. Human Rights considerations

Human rights advocates and people living with HIV have over the years challenged the criminalisation of HIV non-disclosure, exposure and transmission and the arguments used to justify it. They have shown that contrary to the arguments made by its proponents, HIV criminalisation does not support effective responses to HIV, because there is no evidence that it deters people from engaging in behaviour that involve the risk of HIV infection. They have also shown that HIV criminalisation does not protect women but rather exposes them to greater risks of prosecution because of unequal social and economic power between women and men.

Existing laws and prosecutions for HIV non-disclosure, exposure and transmission are often overly broad in scope and vague; contrary to key criminal law principles of legality, foreseeability, intent, causality, proportionality and proof. Laws and prosecutions that fail to take into consideration the abovementioned principles are unfair and may have far-reaching negative impacts on the human rights of people living with HIV. They are likely to infringe upon the rights to liberty and security, health, privacy, access to justice and to non-discrimination. HIV criminalisation also involves a serious risk of selective prosecution as studies conducted in various countries point out that specific vulnerable or marginalised populations are disproportionately impacted by these laws and prosecutions, including migrants, sex workers, people of minority ethnicity, prisoners and in some places, men who have sex with men.

The increased reliance on criminal law has attracted concern and condemnation from UN human rights bodies.¹⁶⁵ As early as 1996, the UN Office of the High Commissioner for Human Rights and UNAIDS expressed concern about the overly broad application of public health and criminal laws to HIV transmission¹⁶⁶. Since then human rights bodies and UN agencies have consistently condemned the criminalization of HIV, in all its forms, and expanded on such initial calls.¹⁶⁷ In 2010, the UN Special Rapporteur on the Right to Health recognized that the criminalization of HIV (unintentional) transmission, exposure and non-disclosure is a violation of the right to health, and called on states:

"To immediately repeal laws criminalizing the unintentional transmission of or exposure to HIV, and to reconsider the use of specific laws criminalizing intentional transmission of HIV, as domestic laws of the majority of States already contain provisions which allow for

¹⁶⁵ Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN. Doc. A/HRC/14/20 (2010); UNAIDS, *Ending Overly Broad Criminalisation*, *supra* note 47.

¹⁶⁶ UNAIDS, *Advocating against overly-broad application of criminal law to HIV transmission* (2008), <http://www.unaids.org/en/resources/presscentre/featurestories/2008/november/20081114criminalization/>; OHCHR, UNAIDS, *International Guidelines on HIV and Human Rights (2006 consolidated version)*, <http://www.ohchr.org/Documents/Issues/HIV/ConsolidatedGuidelinesHIV.pdf>

¹⁶⁷ For example, In 2008, UNAIDS and the UNDP issued a more detailed policy brief which specifically outlined a number of recommendations regarding states' use of both HIV-specific criminal laws and general laws to punish HIV exposure, non-disclosure and transmission. These included calling on states to: "Repeal HIV-specific criminal laws, laws directly mandating disclosure of HIV status, and other laws which are counterproductive to HIV prevention, treatment, care and support efforts, or which violate the human rights of people living with HIV and other vulnerable groups" and to apply general criminal law "only to the intentional transmission of HIV, and audit the application of general criminal law to ensure it is not used inappropriately in the context of HIV", http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf

*prosecution of these exceptional cases*¹⁶⁸.

In 2012, the Global Commission on HIV and the Law issued a comprehensive report that explicitly addressed the impact of criminalizing HIV exposure, non-disclosure and transmission on prevention efforts and human rights. The Commission recommended that:

"Countries must not enact laws that explicitly criminalize HIV transmission, HIV exposure or failure to disclose HIV status. Where such laws exist, they are counterproductive and must be repealed". They noted that "Law enforcement authorities must not prosecute people in cases of HIV non-disclosure or exposure where no intentional or malicious HIV transmission has been proven to take place."

d. Public health impact

There is no evidence that criminalization of HIV non-disclosure, exposure and transmission has any beneficial impact on HIV prevention or on the individual behaviour of people living with or at risk of HIV.¹⁶⁹ To the contrary, criminal prosecutions have contributed to stigma and discrimination against people living with or affected by HIV. Such stigma has a profoundly negative effect on HIV prevention and on the lives of people living with HIV, increasing vulnerability to scapegoating, blame and marginalization within communities. In fact, evidence suggests they are counterproductive, especially where health professionals act as agents of law enforcement. Whilst few are actually feel compelled to report patients living with HIV to the police when they suspect "risky" behaviour, real concerns over medical notes and other scientific data being subpoenaed and used in court, creates a 'chilling effect' between health professional and patients, due to concerns of violations of doctor-patient privilege and their right to privacy. Thus, rather than protecting individuals from HIV transmission, punitive approaches have feared to have damaged and impeded HIV prevention efforts by promoting fear and disincentives for people to test or openly discuss their HIV status, condom use and other forms of safer sex.¹⁷⁰

In addition, two key scientific and medical developments call for an urgent re-consideration of the application of criminal law in the, context of HIV. First, effective HIV treatment has significantly reduced AIDS-related deaths and greatly extended the life

¹⁶⁸ Anand Grover, *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN. Doc. A/HRC/14/20 (2010).

¹⁶⁹ Zita Lazzarini et al., "Evaluating the Impact of Criminal Laws on HIV Risk Behavior", 30 *J.L. Med. & Ethics* 239, 239 - 253(2002), <http://www.hivlawandpolicy.org/resources/zita-lazzarini-et-al-evaluating-impact-criminal-laws-hiv-risk-behavior-30-jl-med-ethics>; Scott Burris et al., "Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial" 39 *ARIZ. ST. L.J.* 467 (2007), <http://www.hivlawandpolicy.org/resources/do-criminal-laws-influence-hiv-risk-behavior-empirical-trial-scott-burris-et-al-39-ariz-st>.

¹⁷⁰ HIV criminalization acts as an obstacle to the enjoyment of the right to health where people living with, or at risk of HIV, feel reluctant to test, access treatment, or discuss difficulties in managing treatment or condom use with their doctor for fear it could be used as evidence against them in court. Expert meeting on the Scientific, medical, legal and human rights aspects of criminalization of HIV non-disclosure, exposure and transmission, Geneva, Switzerland, 31 August – 2 September 2011, http://dl.dropboxusercontent.com/u/1576514/ReportUNAIDSExpertMeetingOnCriminalization_9Feb2012.pdf; Oslo declaration on HIV Criminalisation (2012), <http://www.hivjustice.net/oslo/oslo-declaration/>; Anand Grover, *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN. Doc. A/HRC/14/20 (2010).

expectancy of people living with HIV to near-normal lifespans. Secondly, effective HIV treatment has also been shown to significantly reduce the risk of HIV transmission from people living with HIV to their sexual partners.¹⁷¹ In this context, UNAIDS released a guidance note calling on countries to take steps to end overly broad application of the criminal law in the context of HIV.¹⁷² In a small but growing number of countries efforts have been successful, or are underway, to modernise laws and prosecution based on the best available scientific and medical evidence relating to HIV.¹⁷³

6. Drug Use

a. The nature and scope of the criminal law

National responses to people who inject drugs range from the evidence-informed—that is, properly scaled up, community-led harm reduction services in much of western Europe and Australia—to the punitive—long prison sentences, so-called compulsory treatment and even the death penalty. In 2015, 33 countries or territories had laws prescribing the death penalty for drug-related offences, mostly for trafficking-related offenses, and since 2010 executions for drug offences occurred in at least seven countries.¹⁷⁴ In addition, many of the proven, evidence-informed prevention approaches, including needle and syringe programs, opioid substitution therapy, which can have the greatest and most cost-effective impact on the HIV epidemic among people who inject drugs, are also illegal or unavailable in some countries.¹⁷⁵ Some states opposed to harm reduction measures have criminalized the carrying of needles, syringes and other drug paraphernalia.¹⁷⁶ In 2014 needle-syringe programs were available in only 90 of the 158 countries where injecting drug use has been documented, and opioid substitution therapy was available in only 80 of these countries. Where services exist, coverage is often low. The average number of syringes and needles distributed per person who injects drugs per year in most countries remains well below the internationally recommended 200. Only 15 countries report having met this coverage target for needle-syringe programs at least once in the past four rounds of HIV response progress reporting to UNAIDS, and only 26 countries indicated high levels of coverage (more than 40%) of opioid substitution therapy in 2014.¹⁷⁷

Risk behaviors associated with Injecting drug use is higher in prisons than among the general population. Paradoxically, the provision of harm reduction services in prisons is extremely rare. There are only eight countries with needle-syringe programs in prisons: Armenia, Germany, Kyrgyzstan, Luxembourg, the Republic of Moldova, Spain,

¹⁷¹ UNAIDS, *Ending Overly Broad Criminalisation*, *supra* note 47.

¹⁷² *Id.*

¹⁷³ Bernard and Cameron, *supra* note 158.

¹⁷⁴ UNAIDS, *Do no harm: health, human rights and people who use drugs* (2016), p. 36, [hereinafter “UNAIDS, *Do no harm*”] http://www.unaids.org/sites/default/files/media_asset/donoharm_en.pdf.

¹⁷⁵ UN High Commissioner for Human Rights, *Study on the impact of the world drug problem on the enjoyment of human rights*, UN Doc. A/HRC/30/65 (2015), paras. 13, 15 and 17.

¹⁷⁶ *Submission of the UN Special Rapporteur on Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the Committee against Torture* (19 October 2012), p. 6, <http://www.ohchr.org/Documents/Issues/Health/drugPolicyLaw.pdf>

¹⁷⁷ UNAIDS, *Do no harm*, *supra* note 174 p. 22.

Switzerland and Tajikistan. Opioid substitution therapy in prisons and closed settings is available, to varying degrees, in only 52 countries.¹⁷⁸

b. Justifications for the criminal law

People who inject drugs are among the most marginalized and invisible people in all societies. Many governments find it politically unpalatable to provide adequate HIV and health services for people who inject drugs, who are a heavily stigmatized and criminalized population. There are numerous justifications for such laws. Arguments against harm reduction focus on the myth that access to needle-syringe programs encourage drug use, or that opioid substitution therapy simply replaces one addiction with another when 'drug free' should be the only legitimate goal. Another justification is based on wrongful stereotypes of persons who inject drugs as unable to make decisions about health care or other matters. The myth being that a person's drug use would make him or her unable to adhere to treatment. This results in being denied treatment or taking away decision-making capacity; infantilizing drug users. Other justifications including preventing harm/crime caused by persons on drugs to other persons and maintaining the moral and social values of society, by setting an unwarranted and ineffective 'principled' approach to the use drug users.

c. Human rights considerations

People who inject drugs are almost universally criminalized, either for their drug-use activity or through the lifestyle adopted in order to maintain their drug use. The majority of national drug control policies focus on supply reduction and law enforcement against any drug use, and people who use drugs are often collateral victims of those interventions. This leads to the violations of people's human rights in the name of drug control, including through forced drug testing and compulsory detention, which often include forced labor and violence. Capital punishment laws on drugs are usually reserved for those presumed to be trafficking drugs.¹⁷⁹

Access to harm reduction measures is a well-established component element of the right to health.¹⁸⁰ In 2015, The UN High Commissioner for Human Rights stressed that the right to health should be protected by ensuring that persons who use drugs have access to health-related information and treatment on a non-discriminatory basis. It added that harm reduction programs, in particular opioid substitution therapy should be available and offered to persons who are drug dependent, especially those in prisons and other custodial settings. According to the High Commissioner, consideration should be given to removing obstacles to the right to health, including by decriminalizing the personal use and possession of drugs.¹⁸¹ In addition, the UN Special Rapporteur on health has called for the decriminalization of drug use and possession as an important step towards fulfilling the right to health. He has also argued that when the international drug control regime and international human rights law conflict, human rights obligations should

¹⁷⁸ Harm Reduction International, *Global State of Harm Reduction* (2016), https://www.hri.global/files/2016/11/14/GSHR2016_14nov.pdf.

¹⁷⁹ UNAIDS, *The Gap Report*, *supra* note 62.

¹⁸⁰ See, for example, Anand Grover, *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc. A/65/255 (2010), paras 6, 29, 55; OHCHR, *Study on the impact of the world drug problem on the enjoyment of human rights*, UN Doc. A/HRC/30/65 (2015) para. 61.

¹⁸¹ OHCHR, *Study on the impact of the world drug problem on the enjoyment of human rights*, *supra* note 180, para. 61.

prevail.¹⁸² Moreover, the prohibition of arbitrary arrest and detention, torture and other forms of ill-treatment and the right to a fair trial should be protected in accordance with international norms, including in respect of persons who are arrested, detained or charged for drug-related offences.¹⁸³

Article 6 of the International Covenant on Civil and Political Rights provides that, in those States which have not abolished the death penalty, the sentence of death can only be applied for the “most serious crimes”. As noted above, capital punishment is often reserved for traffickers, however, it is important to keep in mind that users can fall under the definition of trafficking, including if they possess drugs over a certain set threshold. The Human Rights Committee has determined that drug-related offences do not meet the threshold of “most serious crimes”.¹⁸⁴ The United Nations High Commissioner for Human Rights, the Special Rapporteur on torture, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Economic and Social Council, the General Assembly and the Secretary-General support this interpretation.¹⁸⁵

Many are in prison or held in detention at some point in their lives, often for long periods. Estimates suggest that 56–90% of people who inject drugs will be incarcerated at some stage during their life. Hundreds of thousands have been incarcerated in compulsory detention centers, including more than 455 000 in seven Asian countries.¹⁸⁶ In various parts of the world, the possession of clean syringes can be used as evidence to prosecute people who inject drugs or provide grounds for police harassment, thereby deterring safe injecting practices. Regardless of the written law, even in some countries where syringe possession is not criminalized, people who inject drugs report still being subject to police arrest due to the possession of syringes.

d. Public health impact

Criminalization of possession and use of injecting drugs hinders access to health care and hinders the HIV response, as fear of arrest impedes people’s access to and the uptake of HIV services. People are denied access to medical treatment on the grounds of their prior or current drug use, where evidence does not justify denial of treatment. Such denial has occurred on the rationale that a person’s drug use would make him or her unable to adhere to treatment. This may also be due to be due to unjustified restrictions by health-

¹⁸² Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/65/255 (2010), paras. 10 and 62.

¹⁸³ UNAIDS, *Do no harm*, supra note 174; OHCHR, *Study on the impact of the world drug problem on the enjoyment of human rights*, supra note 180.

¹⁸⁴ See HR Committee, Concluding observations: Indonesia, UN Doc. CCPR/C/IDN/CO/1, para. 10; HR Committee, Concluding observations: Thailand, UN Doc. CCPR/CO/84/THA, para. 14; HR Committee, Concluding observations: Sudan, UN Doc. CCPR/C/SDN/CO/3, para. 19.

¹⁸⁵ Manfred Novak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/10/44 and Corr.1; Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc. A/HRC/4/20 (2007), paras. 51-53; *Report of the Secretary-General on the question of the death penalty*, UN Doc. A/HRC/24/18, para. 24.

¹⁸⁶ UNAIDS, *Do no harm*, supra note 174, p. 3.

care providers on the provision of health care for people who inject drugs.¹⁸⁷ The Special Rapporteur on Health has noted that the same standards of ethical treatment apply to the treatment of drug dependence as to other health-related conditions, including with regard to the right of a patient to make decisions about treatment and to refuse treatment.¹⁸⁸

Approximately 13% of people who inject drugs are living with HIV.¹⁸⁹ UNAIDS estimates that 140 000 [112 000–168 000] people who inject drugs were newly infected with HIV globally in 2014.¹⁹⁰ People who inject drugs and their sexual partners account for approximately 30% of new HIV infections outside sub-Saharan Africa. Evidence available to UNAIDS suggests that there was no decline in the annual number of new HIV infections among people who inject drugs between 2010 and 2014.¹⁹¹ On the basis of data from 49 countries, it is estimated that the average risk of HIV infection is 22 times greater among people who inject drugs than among people in the general population; in 11 of those countries, the risk is at least 50 times higher.¹⁹² In eastern Europe and central Asia, a region where the number of people newly infected is rising, national HIV epidemics are typically driven by the use of contaminated injecting equipment and by further transmission to the sexual partners of people who use drugs.¹⁹³

While limited disaggregated data is available on injecting drug users, the existing data indicates that some persons face compounding stigma and discrimination, impacting their health even more. For example, drug use, including by injection has been documented in prisons across the globe. High rates of sharing injecting equipment, lack of effective harm reduction programs and treatment in prisons leads to an elevated risk of transmitting HIV in prisons.¹⁹⁴ Additionally, the HIV prevalence among women who use injecting drugs is higher than men. Sex workers who inject drugs have a much higher prevalence than non-injecting sex workers, with female sex worker prevalence higher than male. Transgender women who sell sex and inject drugs are at an even greater risk of acquiring HIV.¹⁹⁵

Many states, including those with the harshest laws and policies, often have absent or inadequate prevention programs.

IV. Commonalities in the issues

Despite the variety of their focus, content and scope, the criminal laws described in the section above have several commonalities. They are all influenced and justified by common arguments relating to the protection of social order or morality, the promotion of religious beliefs or culture, and allegations relating to the protection of the persons

¹⁸⁷ OHCHR, *Study on the impact of the world drug problem on the enjoyment of human rights*, *supra* note 180.

¹⁸⁸ *Id.*, para. 8.

¹⁸⁹ World Health Organization (WHO), *Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care for Key Populations* (2014) [hereinafter “WHO, *Consolidated Guidelines*”], p. 5.

¹⁹⁰ UNAIDS, *Do no harm*, *supra* note 174, p. 11.

¹⁹¹ *Id.*

¹⁹² WHO, *Consolidated Guidelines*, *supra* note 189 p. 5.

¹⁹³ UNAIDS, *The Gap Report*, *supra* note 62, pp. 175-176,

¹⁹⁴ OHCHR, *Study on the impact of the world drug problem on the enjoyment of human rights*, *supra* note 180, paras. 21-23.

¹⁹⁵ UNAIDS, *The Gap Report*, *supra* note 62, pp. 175-176,

involved and third parties. The application of the criminal law in the areas of sexual orientation, sex characteristics, gender identity and expression; abortion; sex work; adultery; HIV non-disclosure, exposure or transmission; and drug use is often based on negative gender, social and cultural stereotypes. This application of the criminal law is often grounded on several interrelated assumptions which raise considerable concern including:

- infer and proscribe a natural order of gender relations
- prescribe gender differentiated binary roles between men and women
- preserve heteronormativity
- call for the 'normalizing' or protection of such persons.¹⁹⁶

Individuals targeted by the criminal law belong to populations that are often marginalized and that are either silenced or ignored when it comes to the development of laws or policies that affect them. The criminal law has far reaching human rights impact including exacerbating discrimination, and denying drug users, people who engage in same sex conduct, women, gender non-conforming individuals and people living with HIV of fundamental human rights relating to control over their bodies and autonomy in choices about their lives. The application of the criminal law against these populations also has been shown to have serious negative health consequences for the individuals involved and for the public, thus raising further concerns about the reasonableness and other justifications for these laws.

In many countries and context, there have been sustained efforts to respond to the misuse of the criminal law and its impact on specific populations. Whether it is through groundbreaking litigation, legislative and policy reform, change in practice and community mobilization, there are common strategies and arguments that are often used in the successful responses to the criminal law.

Human rights principles and protections, which are found in international and regional human rights treaties and in national laws and constitutions, have played a key role in successful decriminalization of many of the issues raised in this paper, including abortion and same sex behavior. While a range of human rights have been successfully invoked, including the right to privacy and to be free from torture and other ill-treatment, a few human rights protections have been particularly successful and that address the underlying causes of such harmful laws and practices. These include the right to non-discrimination and equality, and the right to health. While not all of the successes have been recognized to encompass these rights, they usually are supported by at least one of these rights, whether it is based on national constitutions or international law protection or both. It also often recognized that discrimination is a contributing factor to a broad range of other human rights violations, such as those related to violence or to health, for example. The interdependence of rights is increasingly being recognized in these contexts.

Related to the right to health (and, in part, also to non-discrimination) are public health arguments which have played an instrumental role in fostering positive change. The harm

¹⁹⁶ See e.g. *Naz Foundation v. Government of NCT of Delhi*, *supra* note 62; *National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others*, Decision of 9 October 1998 (6) BCLR 726 (South Africa, Constitutional Court).

reduction approach has played a very important role in helping to reform criminal laws, on almost every issue, including HIV transmission, drug use, sex work, same sex conduct and abortion. In some cases, success lies primarily on the harm reduction approach, such as on some issues related to sex work. In other contexts, it is coupled with human rights protections, such as in the context of abortion or same sex behavior.

Regardless of strategy used to affect change, recognizing the harm caused by these laws has to led to the participation of the most affected communities in the process of law reform and litigation. It has led to the debunking of harmful stereotypes often rooted in religious or moral beliefs and ensuring they do not continue to guide laws and practices, and to recognizing that individual and community experiences are critical to positive change. Relatedly, the scientific evidence base has been an important influencer of change. This is evident in court judgements and legislative histories which have found criminal laws in violation of human rights protections oftentimes based on evidence



BACKGROUND PAPER 2:¹⁹⁷

Human rights and criminal law principles

Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV

Conveners: International Commission of Jurists (ICJ), UNAIDS and OHCHR

Room XXIII, Building E, Palais Nations

Geneva, Switzerland

3-4 May 2018

Introduction

1. The purpose of this convening of jurists is to identify the human rights framework for the elaboration of a set of principles to help legislatures, the courts, administrative

¹⁹⁷ The authors of this paper wish to thank Richard Elliott, Kene Esom, Susana Fried, Prof. Alice Miller, and Jamie Todd-Gher for their insightful comments on an earlier draft of this paper. They are also indebted to Jaime Todd-Gher, Legal Advisor, Law and Policy Programme, Amnesty International, for kindly making available to them an internal Amnesty International paper entitled: "Criminalization of sexuality and reproduction, exploring limits on state punitive regulation", on which the present document draws. In addition, the present paper draws on Amnesty International's recent publication, *Body Politics: A Primer on Criminalization of Sexuality and Reproduction*, 2018 (Index: POL 40/7763/2018) [hereinafter *Body Politics*].

and prosecutorial authorities, and advocates address the detrimental impact on health, equality and human rights of criminalization, including, in particular, of consensual sexual conduct, reproduction, personal drug use, as well as the overly broad criminalization of HIV exposure, transmission and non-disclosure. The principles to be eventually elaborated should help both in the development of new criminal legislation, and in reviewing existing criminal provisions.

2. This paper explores and sets out propositions, drawn from international human rights law (IHRL) and substantive criminal law that may be further elaborated into a set of principles. These, in turn, could be applied to, among others, the overly broad criminalization of HIV exposure, transmission and non-disclosure, as well as the criminalization of consensual sexual conduct, reproduction and personal drug use, at a minimum, with a view to promoting decriminalization efforts as critical to mitigating the detrimental impact of criminalization on health, equality and human rights in these contexts and beyond.
3. During expert meetings held by OHCHR and UNAIDS in Bellagio and Geneva (see other background paper) in 2017, it was recognized that compliance with IHRL and standards is a prerequisite for just, fair and effective criminal justice systems, which, in turn, are core components of just, fair and open democracy. Proposals were put forth in order to identify a set of human rights principles guiding the resort to and use of the criminal law. In this context, participants to those meetings identified the 'Siracusa Principles',¹⁹⁸ as relevant, and used them as a reference. Participants also stressed that universal human rights principles inform and infuse substantive and procedural criminal law, and ensure the proper functioning of criminal justice systems, in particular, within frameworks consistent with the principles of non-discrimination, equality before the law and equal protection of the law for all without discrimination.
4. Consistent with this, the primacy of human rights rules out the design and implementation of criminal laws inconsistent with human dignity, such as those that infringe or otherwise deny the right to liberty and security of person arbitrarily or otherwise unlawfully, including when they do so on a discriminatory basis, and, in fact, *a fortiori*, in that case. In other words, criminal laws that are *per se* discriminatory and/or whose enforcement is discriminatory – for example, because they are used to target a particular behaviour or expression or group of individuals in a manner that is arbitrary (e.g., in a way that ignores actual facts and/or other

¹⁹⁸ UN Commission on Human Rights, 41st Sess., 28 September 1984, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, annex. The Siracusa Principles were developed by the American Association for the International Commission of Jurists, and are available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>. The Siracusa Principles lay out the extent to which States can limit and/or derogate from individual human rights to promote the 'public good.' They were initially adopted in relation to the International Covenant on Civil and Political Rights (ICCPR), but over time have been applied to analyse State restrictions on rights more broadly. See S Abiola 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant for Civil and Political Rights (ICCPR): History and Interpretation in Public Health Context' (Research Memorandum Prepared for the Open Society Institute's Public Health Program Law and Health Initiative) (2011).

evidence) or on discriminatory grounds prohibited under IHRL (e.g., sex, gender, gender identity or expression, sexual orientation, etc.) – are inconsistent with, and violate IHRL.

Human rights and substantive criminal law: Some principles

5. At the outset, it is important to acknowledge and highlight a certain overlap between propositions derived from IHRL and those arising from substantive criminal law. Indeed, some IHRL notions are actually coterminous with certain foundational principles of substantive criminal law, as it is the case, for example, with respect to the principle of legality (see below). There is also a substantial overlap and mutual influence between IHRL and criminal procedure with respect to due process rights in the context of the enforcement of the criminal law. However, criminal procedure notions and their counterparts in IHRL (i.e. due process rights) are beyond the scope of the present analysis. Though relevant to an overall assessment of the detrimental impacts of criminalization, they do not assist in ascertaining whether a certain act or omission should legitimately be criminalized or not, which is the immediate aim of this project. This paper focuses on substantive criminal law and IHRL notions that have a bearing on it, as opposed to on criminal procedure.
6. Put succinctly, among other things, substantive criminal law is concerned with identifying and defining acts and omissions as criminally sanctionable,¹⁹⁹ and determining who, and under what circumstances, may rightly be held criminally liable.²⁰⁰ The criminal law is the established State response to crime. As Prof. Ashworth has observed, “criminal liability is the strongest formal condemnation that society can inflict”.²⁰¹ States purportedly criminalize particular behaviour deemed threatening or harmful to the health, safety, property or “moral welfare” of people.²⁰²

¹⁹⁹ Prof. Glanville Williams’ answer to the question “what is a crime?” was that it was “an act that is capable of being followed by criminal proceedings having one of the types of outcome (punishment etc.) known to follow these proceedings”. Glanville Williams also suggested that the criminal law is best defined by the procedures it uses.

²⁰⁰ The criminal law recognizes certain circumstances as capable of relieving the accused entirely or partially of blame, notwithstanding the harmful results of their actions. They are as follows: 1) when the accused are below the age of criminal responsibility or when they are affected by “insanity”, they are entirely exempted from criminal liability; 2) when the accused lack capacity at the relevant time (e.g., accused although not insane or below the age of criminal responsibility, were not responsible for their actions at the relevant time), again this would result in a total exemption from criminal liability); 3) lack of required mental state. This is the case when the accused lack the necessary intent or foresight required for a particular crime. E.g., the *mens rea* required for murder in substantive criminal law in England is an intention to kill or cause grievous bodily harm. In such cases when the accused have committed the *actus reus* of the offence but lack the actual intent or foresight required, then the accused will ordinarily be guilty of a lesser offence, e.g. manslaughter, instead of murder. In those circumstances, the accused will be partially exempted from criminal liability (in the example above they will be guilty of a lesser crime, manslaughter); 4) special defences. Those arise in circumstances when the accused had the required mental state necessary to be convicted as charged, but rely on a particular defence, e.g. they were acting in self-defence or were threatened with death or serious injury (duress) if they did not commit the crime.

²⁰¹ Andrew Ashworth, *Principles of Criminal Law*, 6th edition, Oxford University Press, 2009, p. 1. With respect to this, Prof. Alice Miller observed that in plural legal systems, religious exclusions and condemnations may be equally powerful.

²⁰² Amnesty International, Body Politics, POL 40/763/2018, p. 28.

The State's power to criminalize has often been defended on the grounds that it is instrumental to implementing the will of the majority, who, commonly, view certain conduct as harmful and, in turn, accept that its perpetrators generally deserved sanction. Whether criminal statutes as adopted truly reflect majoritarian wishes is in many instances a matter of contention. In any event, IHRL and standards, and the rule of law more generally, necessarily and by design will sometimes clash with majoritarian volition.

7. Substantive criminal law principles, adherence to which is essential to ensure the legitimacy of the imposition of criminal liability, are critical tools for understanding and applying the criminal law. The criminal law is conceptualized as, for example, serving the following functions:²⁰³
 - To provide guidance on the kinds of behaviour that are seen by society as acceptable and unacceptable, because, in turn, they are perceived as **causing or unacceptably risking harm**.
 - Through punishment, to **deter** (forward looking) from – or condemn (retroactive) people for – doing acts that are perceived to cause certain kinds of harm to others or society, or that unacceptably risk causing harm;²⁰⁴
 - To set out the conditions under which people who have caused or risked harm through such acts will be held culpable and deserving of punishment (i.e. **retribution**); and

²⁰³ Others have offered different typologies to identify the functions of the criminal law. Generally four main functions are identified: (1) incapacitation, i.e., stop the particular person who has committed an offence from causing further harm; (2) rehabilitation, i.e., provoking an internal change in consciousness on the part of the criminally punished person, such that, they recognize, if they did not before, the wrongness of their conduct and, therefore, do not do it again; (3) deterrence, whether of a specific person or generally, i.e., the prospect of punishment dissuades a person from doing the prohibited act; and (4) retribution, i.e., punishment for the sake of punishment because it is deemed “morally” deserved. These functions are not mutually exclusive, and indeed they are closely linked and to some degree overlapping. There is also another function that the criminal law is said to perform, namely, an expressive function. This relates to the symbolic role of the criminal law – those who support the existence of a certain criminal provision may do so notwithstanding the fact that evidence may clearly show its ineffectiveness as a deterrent. It is about the symbolic role that the criminal law performs. See “On the Expressive Function of Law”, Cass R. Sunstein, *University of Pennsylvania Law Review*, Vol. 144: 2021.

²⁰⁴ J.S. Mill articulated the well-known harm principle: the criminal law should seek to punish only conduct causing harm to others. Some conduct may be “immoral” – i.e., unethical – but if it does not harm others – or only harms the person carrying it out – then it is unsuitable for punishment under the criminal law. Criminalizing such conduct would infringe individuals’ liberty unnecessarily. However, the focus of the criminal law is not just on causing direct harm to others, since the criminal law proscribes, for example, harm to the State, “public morals” and damage/harm to the environment. Further, criminal law also proscribes conduct that on a particular instance may or may not cause harm, but that puts others at risk, e.g. dangerous driving. The criminal law also proscribes and punishes attempts to commit crimes, and conduct that assists others in perpetrating crimes. There are also examples of criminal laws designed to protect people from harming themselves, e.g. wearing car seat belts. Definitions of the meaning of harm are inconsistent and at times vague and difficult to apply. Harm may include the notion of injury, whether material, monetary, psychological, mental or physical, and also the threat of such harm, as well as acts that would cause or carry a significant risk of that harm.

- To hold those individuals accountable by finding them criminally liable for certain violations of IHRL, ensuring, in turn, **a reparative measure** to which crime victims are entitled under IHRL.²⁰⁵
8. In substantive criminal law terms, most criminal offences comprise – or, arguably, should comprise (other than for instance for appropriately conceived strict liability offences, such as in cases concerned with corporate criminal liability) – the following two elements:
 - **Material element, i.e., an act/omission (*actus reus*):** for the accused to be found guilty they must have committed an act – or have omitted to do so notwithstanding a legal obligation to act – that has brought about, or unacceptably risked bringing about, a prohibited kind of **harm**; and
 - **Mental element (*mens rea*):** for the accused to be found guilty it must be proven that, at the time of the commission or omission of the material element, they possessed a defined degree of mental **culpability**,²⁰⁶ deserving censure, for having caused that harm.
 9. These two fundamental, definitional elements, namely, **harm** and **culpability**, are core to defining criminal offences, and thus to determining what and who should and should not be criminalized.
 10. With respect to this, in the context of HIV criminal laws, for example, the Consensus Statement on HIV “Treatment as Prevention” in Criminal Law Reform’, observes;

[T]he two biggest problems with almost all HIV criminal laws and prosecutions are that 1) they focus on HIV disclosure rather than on whether the PLHIV [person living with HIV] had an intent to do harm; and 2) HIV laws’ felony punishment and severe sentences treat any risk of HIV infection as the equivalent of murder or manslaughter. Our most pressing responsibility in HIV criminal law reform is to challenge these two problems by advocating for the related core legal principles that (1) convictions must require proof that the person intended to do harm; and (2) the degree of punishment must be closely related to the level of injury. In changing the criminal law’s treatment of HIV, it is important to lead with these principles. There is nothing unique about HIV—or exposure to any disease through consensual sex, for that matter—that requires giving up these core principles. Current science makes it clear that HIV is not easy to transmit, and even when transmitted it is easily survivable with

²⁰⁵ As Ian Seiderman observes, IHRL does not require this reparative function of the criminal law in circumstances where the criminalized conduct is itself “victimless”.

²⁰⁶ In the criminal law context, culpability may be defined as the blameworthiness of the accused. Generally speaking, people charged with a crime should only be found guilty of that crime when they are actually found to have been culpable for the conduct in question, and they cannot rely on defences, such as incapacity and duress, or other exemptions from criminal liability, including being below the age criminal responsibility. This is why, ordinarily, a higher level of culpability needs to be shown in criminal law than say in civil law (e.g. in tort), at least for serious offences. In fact, generally, the higher level of censure that attaches to a certain crime, the greater level of culpability needs to be proven. In ascertaining their culpability, generally, the accused are blamed for their actual conduct, as well as its consequences.

*appropriate treatment.*²⁰⁷

What are the limits?

11. While States generally have some latitude to determine what type of conduct is sufficiently harmful to others and the community at-large to merit criminal sanction, this power is not unlimited.²⁰⁸ With respect to substantive criminal law, these limits address the question of what conduct can be proscribed. Various human rights principles can be applied to limit State action, including the passage and enforcement of criminal law that impair the enjoyment or exercise of human rights. Indeed, some have emphasized that, historically, human rights have their origin in the desire to defend individual liberty and dignity against the State's iniquitous exercise of power in the public sphere. Human rights limit and control the authorities' power to act against individuals and groups.²⁰⁹ This clearly includes within the criminal justice system where human rights limit, control or regulate the authorities' proscription of action through criminal laws and, following a law proscribing that action, the enforcement of criminal offences through criminal investigation, prosecution, pre- and pending trial detention, trial proceedings against individuals, and sentencing after conviction with the aim of protecting individuals against the power of the State.
12. Thus, substantive criminal law and IHRL provide some guidance on what States can legitimately criminalize, and when they do so, on how they can do it. Together they constitute long-standing normative and legal principles guiding States to avoid unwarranted and unnecessary and, thus, illegitimate and in some instances unlawful criminalization,²¹⁰ as well as unfair modes of criminalizing.
13. IHRL assists us, in this context, to identify that behaviour that constitutes the protected exercise and enjoyment of one's human rights (throughout this paper referred to as **human rights-protected activities** as shorthand), and which, in turn, should not be criminalized. The substance of certain 'criminal offences' may be directly contrary to human rights in the sense that the conduct criminalized is actually

²⁰⁷ 'Consensus Statement on HIV "Treatment as Prevention" in Criminal Law Reform', p. 1, on file with the authors.

²⁰⁸ See, e.g., the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant for Civil and Political Rights.

²⁰⁹ In this context, it must be noted that, it is only relatively recently that it has been acknowledged that IHRL's focus on protection from State overreach excluded the realities of women and girls, particularly in respect of gender-based violence perpetrated by private actors. This recognition has given rise to the wide application of the due diligence standard, a development that has been celebrated by many women's rights advocates, but that has also elicited calls for caution among some. See e.g., Goodmark, Leigh. "Exporting Without License: The American Attempt to End Intimate Partner Abuse Worldwide," Leigh Goodmark and Rashmi Goel, eds., *Comparative Perspectives on Gender Violence: Lessons From Efforts Worldwide* (Oxford University Press, 2015); Goldscheild J and Liebowitz D, *Due Diligence and Gender Violence: Parsing its Power and its Perils*, 48 *Cornell Int'l L.J.* 301 (2015).

²¹⁰ See, Amnesty International, *Body Politics*.

a human rights-protected activity. Indeed, punishing acts that should not be criminalized in the first place violates IHRL.²¹¹ Many human rights may be lawfully limited, restricted, or derogated from, in accordance with the provisions of human rights treaties. Human rights, generally, including, among others, the right to freedom of expression, assembly and association; to freedom of religion or belief; to bodily, including sexual autonomy,²¹² to determine the number and spacing of children; to one's gender identity or expression; to privacy; to non-discrimination, equality before the law and equal protection of the law, can all be understood to set clear limits on what type of conduct – and whether and, if so, within what parameters – States can lawfully criminalize. For example, in a 2015 judgment, the South Korean Constitutional Court ruled that article 241 of the Criminal Act, making adultery a crime carrying a penalty of up to two years' imprisonment, was unconstitutional. Some judges focused on the fact that the criminalization of adultery was contrary to the "right to sexual self-determination and secrecy and freedom of privacy", further stating that, "despite [the fact that] it is unethical to violate the marital fidelity, it should not be punished by criminal law". Other judges argued that there is an "excessive exercise of State's criminal punishment authority in that it excessively restricts the right to sexual self-determination, overstepping its limited role in achieving the purpose and function of criminal punishment".²¹³

14. The Colombian Constitutional Court in the case C-221 of 1994 decriminalized narcotics for personal use on the grounds that criminalization in this context violated the right to autonomy. While analysing the provisions that criminalized such use, the Court stated:

Bear in mind that the article (article 16 of the Colombian Constitution) recognizes such liberty "in nuce", because any kind of liberty refers to that one (personal autonomy). It is the recognition of the person as an autonomous and dignified human being (art. 1 C.P), the basis upon which a person is an end in itself and not a means to an end. It has full capacity to decide on her own acts, and, above all, on her destiny. The first consequence that stems from autonomy is that it is the individual (and no one in her name), who must give meaning to her existence, as well as its direction. If a person has autonomy, it can only be limited when it conflicts with others' autonomy. John Rawls in a "Theory of Justice", in stating the principles of a just society among free people, first formulates the principle of liberty in the following terms: "Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others". From such approach, it is only with the objective to enforce other's liberty, and only with such one, that my liberty can be restricted. (...) Under the notion of treatment for certain conduct that is judged as deviant, as sicknesses, hides the most ferocious power of repression, more censurable when it introduces itself as a paternal attitude (almost loving) vis a vis

²¹¹ Amnesty International, Fair Trial Manual (2nd edition), POL 30/0002/2014, p. 176.

²¹² As Prof. Miller observes, [a] tendency to focus on sexuality as private intimate conduct has left many rights important to sexuality, but which are oriented to public life, such as rights to expression and information, movement, assembly and association, less fully articulated and protected as sexual rights", 'The need to update: the contemporary scope and function of justifiable limits by states, of [sexual] rights in the name of *public morals*. An inquiry into the use of 'public morals' justifications in human rights and trade regimes', draft manuscript on file with the authors.

²¹³ http://english.court.go.kr/cckhome/eng/decisions/majordecisions/majorDetail.do?searchClassCode=EN_EXECLSS&searchClassSeq=521.

the dissident. Reclusion in psychiatric establishments or similar, has been for a long time a mechanism used by totalitarian regimes to “cure” heterodox people. Contemporary societies have treated drug addicts as heterodox, people who are sick and must be shown the world as seen by those who rule. On this point Szasz, with his common sharpness states: “the fact of using drugs is not an involuntary sickness, is a completely deliberate way to confront the difficulty of living, the illness of living. But as we do not know how to cure the illness of living we prefer to treat the drug addict.” (...) Unless being a drug addict is considered in itself punishable, even when such behavior does not transcend the most intimate orbit of the consumer, it is a sphere subtracted from law, and in principle, banned in a legal structure that finds in personal autonomy and dignity (free to decide her own destiny) the basic pillars of all legal superstructures. Only conduct that interferes with others’ freedom and interests can be legally constrained. Legal classification of a conduct that in itself only involves the person who carries it out, is not aligned with our legal framework, and consequently, is removed from the legal control that we call law, more so in a legal system that respects liberty and dignity, as ours does....To recognize and guarantee personal autonomy, but to establish as its limit the whim of the Legislator, is a trick that would deny what is being affirmed. Its equivalent to state: “you are free to choose, but only to choose what is good and what is good is what the State tells you it is”.(...) And it cannot be said that all that the Legislator does is in the name of the common interest, because, in turn the common interest is deduced from observing rigorously the established basic standards to achieve a just society. In other words: that people are free and autonomous to choose their way of life, as long as such way does not interfere with others’ autonomy, is part of the essential common interest of a individualistic society, that the Constitution that is in place today has tried to shape. If the right to personal autonomy has any sense in our system, we must conclude that, on the basis of the aforementioned arguments, the provisions that criminalize narcotics, are clearly unconstitutional.

15. Among other things, the OHCHR-organized expert meeting in Geneva in 2017 explored the idea that conduct should not be criminalized if there is no grievous and serious actual harm, there are not complainants, and no perceived community harm. Moreover, restricting an individual’s human rights through criminal law sanctions may only be justified when other, less restrictive legal responses would be inadequate and unable to achieve the legitimate aim or purpose pursued.²¹⁴
16. Furthermore, human rights have an impact on the way in which substantive criminal offences are defined, entailing, for example, requirements concerning clarity/certainty, culpability, proportionality, necessity, last resort and non-discrimination.
17. Furthermore, in considering which circumstances justify a criminal law response, the human rights framework assists us in addressing important questions about both the substance of crimes and the procedures to enforce the criminal law: e.g., is this a

²¹⁴ OHCHR meeting report (2017), on file with OHCHR.

kind of “harm” by which society is harmed? What are the conditions in which the State is allowed to restrict the enjoyment of some limited range of rights? When it does limit or restrict those rights, has the State acted in a way that is just and fair at all stages?

18. The right to liberty and security of person, the right to private and family life, the right to a fair trial, the principles of legality, proportionality and necessity, as well as the principle of non-discrimination and the rights to equality before the law and equal protection of the law for all without discrimination, among others,²¹⁵ are all critical tools to understand and analyse the application of the criminal law. While chiefly a critical important notion with respect to criminal procedure, where it is mainly applicable, the presumption of innocence, as provided for in IHRL, is also relevant to substantive criminal law, where for example, it runs counter to the notion of criminal offences defined on the basis of strict liability. Arguably, the presumption of innocence entails that serious offences, namely, those that upon conviction may lead to deprivation of liberty, should generally comprise a culpability requirement.²¹⁶
19. Thus, IHRL and fundamental principles of the criminal law together provide guidance on what acts or omissions States can legitimately criminalize, on who can legitimately be criminally sanctioned (that is, in the absence of defences to and exemptions from criminal liability), and on how States can do so. States can enforce criminal law powers that are consistent with, and thus permitted under IHRL, so long as such powers are provided for in national law; serve a legitimate aim; and are proportionate and necessary.

Ultima Ratio Principle

20. The principle of *ultima ratio* - criminal law as a last resort – is a critical constraint on the State’s power to make certain acts or omissions subject to criminal sanctions, since, those are one of the most severe forms of State intrusion on human rights, and thus must be used with great caution and in limited circumstances.²¹⁷ Beyond *ultima ratio*, States’ criminal justice powers that impact on human rights may be constrained by the principles of legality (see below), legitimate purpose, necessity, proportionality and non-discrimination. The *ultima ratio* principle has different resonances across legal systems and is central to civil law-based systems.

Legality

²¹⁵ Other critical rights include those listed above at paragraph 13, for example.

²¹⁶ See above, para. 8 recalling that, in substantive criminal law terms, most criminal offences (other than for instance for appropriately conceived strict liability offences, such as in cases concerned with corporate criminal liability) comprise – or, arguably, should comprise – both a material and a mental element.

²¹⁷ See generally N Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO STATE J. OF CRIM L. 521 (2005); Douglas Husak, *THE CRIMINAL LAW AS LAST RESORT*, 24 OJLS 207 (2004).

21. The principle of legality is a recognized general principle of law, a foundational requirement contained in almost every international human rights instrument,²¹⁸ as well as a basic tenet of criminal law.²¹⁹ It requires that crimes – and corresponding sanctions – be defined in law in an intelligible manner, and in a way that clearly outlines what conduct is criminalized. Vague and overbroad laws, purporting to prevent intangible social harms, such as generic “[im]morality” laws, which can be used to punish a wide range of behaviors enforced in an abusive manner, likely fail to satisfy the principle of legality.²²⁰ As such, the requirement of **legality**, and more precisely, **legal certainty**, or *lex certa*, is another basic principle of general criminal liability, and it is a foundational principle of substantive criminal law. In fact, legal certainty is a general, basic principle of law: namely, the law needs to be predictable, fairly certain and capable of being respected. Legal certainty is particularly important in the criminal law context, given the gravity of the consequences that breaches of the criminal law entail. The principle of legality requires that criminal offences must be clearly, precisely and comprehensibly drafted so as to be ordinarily understood.
22. Criminal provisions that fail intelligibly to define the conduct to which they relate, for example because of their **vagueness or because they are overly broad**, violate the principle of legality, and thus the rule of law. The Kenyan High Court judgment in *Aids Law Project v AG and others* upholds and illustrates the principle of legality, and it is illustrative of the overlap between IHRL and substantive criminal law principles in this context. The judgment concerned section 24 (criminalization of HIV non-disclosure and exposure) of Kenya’s HIV Aids Prevention and Control Act. In holding section 24 to be vague and overbroad, and therefore unconstitutional, the Court stated: “*Legality is a fundamental rule of criminal law that nothing is a crime unless it is clearly forbidden in law. This principle is a core value, human right, but*

²¹⁸ See, e.g. Article 15(1) ICCPR, in respect of the principle of *nullum crimen sine lege*.

²¹⁹ See S Lamb ‘*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law’ in A Cassese & P Gaeta, *et al.* (eds.). The principle of legality covers several rules, which are interconnected and sometimes overlapping. First, the prohibition on the retroactive application of the criminal law: no act may be punished as a crime that was not a criminal offence under a law applicable to the accused at the time of the act, and the rule that upon conviction the accused may not be punished with a higher penalty than that which was provided in law when the action took place. Second, the rule that the criminal law must be sufficiently clear to provide notice that the act was prohibited at the time it was committed (principle of *lex certa*). Third, the rule that a crime may not be created through analogous application of criminal law (prohibition against analogy or *lex stricta*). Fourth, in line with these rules, it is often also accepted that only criminal law statutes can define a criminal offence and prescribe a penalty (principle of *lex scripta*). See, Piet Hein van Kempen, ‘Introduction – Criminal Law and Human Rights’, in: P.H.P.H.M.C. van Kempen (ed.), *Criminal Law and Human Rights, The International Library of Essays on Criminal Law, England/USA*: Ashgate, 2014, p. XI-XXXIII. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953285. See also, some of the general principles of criminal law enshrined in the Rome Statute of the International Criminal Court, e.g., Article 22 *Nullum crimen sine lege*, Article 23 *Nulla poena sine lege*, Article 24 Non-retroactivity *ratione personae*, Article 25 Individual criminal responsibility.

²²⁰ Amnesty Body Politics; see also Siracusa Principles; see also *Naz Foundation (India) Trust v Government of NCT of Delhi and Others*, Writ Petition (Civil) No. 7455/2001, Delhi High Court (2 July 2009). The Naz decision resulted in the invalidation of the criminalization of same-sex conduct between consenting adults across all of India. As the petition involved a constitutional matter, the judgment applied throughout India. However, the judgment was restricted to adults, all minors are presumed not to be able to consent to a sexual act, see para. 132. However, the Supreme Court of India, in 2013, overturned this groundbreaking decision by the Delhi High Court, deferring the matter for the legislature to resolve, and thus, upheld the constitutionality of the law. This ended a four-year period of decriminalization. In February 2016, however, the Supreme Court agreed to reconsider its 2013 judgment. There are currently two cases that have been joined and are pending consideration before a Constitution Bench of the Indian Supreme Court.

also a fundamental defense in criminal prosecution in a way that no crime can exist without a legal ground.”²²¹ The judges also held that section 24, in addition to being unconstitutional for being vague and lacking in certainty, was also overbroad and likely to violate the right to privacy enshrined in the Kenyan Constitution.²²²

23. The requirement of **legal certainty**, set out above, is related to, albeit distinct from the concern about **overbreadth**. Vagueness in the law makes it inconsistent with the principle of legal certainty. The law may be absolutely clear and certain as to what is prohibited – thereby satisfying the requirement of the crime being clearly “prescribed by law”. However, the criminal provision in point may still be overbroad, and thus objectionable – and potentially invalidated – on this ground because it is overly broad. Having said that, the vaguer a law is, the greater the likelihood that it will be interpreted and applied in overly broad ways.

24. In *Canada Attorney General v. Bedford* (2013), the Supreme Court of Canada found certain provisions of the Criminal Code prohibiting the “living off the avails of prostitution”²²³ to be overbroad, as they covered activity that sex workers themselves had identified as actually providing safety.²²⁴ The government had sought to justify the prohibition on the grounds that it protected women, from “*intimidation and manipulation of the kind that make it very difficult for women to testify*”.²²⁵ The Court held that, while the prohibition might have captured relationships that were exploitative, it was so overbroad that it also concerned clearly non-exploitative relationships that thus bore no relationship to the law’s purpose, and thus, was unconstitutional.²²⁶ In rejecting the overbreadth of the law, the Court was able to address the way a stereotype had been used to justify the law’s overbreadth and thus also debunked the myth that all sex workers are inherently vulnerable to third party abuse and their experiences are untrustworthy in terms of identifying exploitative situations. The Court recognized the harm caused by the criminal provisions, and held such prohibitions in practice also violate sex workers’ constitutional right to security of the person, as they, “...heightened the risk the applicants face in prostitution-itself a legal activity. They not merely impose conditions on how prostitutes operate. They go a critical step further by imposing dangerous conditions on prostitution; they prevent people engaged in risky—but legal—activity from taking steps to protect themselves from the risks.”²²⁷

²²¹ *Aids Law Project v AG and others*, para. 59, available at <http://kenyalaw.org/caselaw/cases/view/107033/>.

²²² *Ibid*, para. 91.

²²³ NB various other provisions of the law affecting prostitution were impugned in this case, not just those criminalizing “living off the avails of prostitution”.

²²⁴ *Canada (Attorney General) v. Bedford* (Canada, Supreme Court), 2013 SCC 72, [2013] 3 S.C.R. 1101, paras. 6, 9, 14, 18, 22.

²²⁵ See e.g., *Canada (Attorney General) v Bedford* (Canada, Supreme Court), 2013 SCC 72, [2013] 3 S.C.R. 1101, para. 143.

²²⁶ *Canada (Attorney General) v. Bedford* (Canada, Supreme Court), 2013 SCC 72, [2013] 3 S.C.R. 1101, paras.144-145, 162.

²²⁷ *Canada (Attorney General) v. Bedford* (Canada, Supreme Court), 2013 SCC 72, [2013] 3 S.C.R. 110; see also, *Report of the UN Secretary-General to the UN General Assembly, Implementation of the Declaration of Commitment on HIV /AIDS and the Political Declaration on HIV and AIDS. On the Fast Track to Ending the AIDS Epidemic, A/70/811*, para 13 (1 April 2016), para. 53.

25. Another important and related aspect of the application of the principle of legal certainty is that it, in turn, **requires specificity**, as to do otherwise would risk giving State authorities unwarranted power to decide, at their discretion, whether or not something/somebody should be prosecuted. Legal certainty further requires that offences should be defined in such a way that anyone can ascertain what level of penalty is attached to which conduct.

Legitimate Purpose

26. States must also demonstrate that they have a legitimate purpose for restricting individuals' human rights, including through criminalization of particular conduct. IHRL recognizes that States have a legitimate interest in protecting national security, public order, safety, public health or morals,²²⁸ or the protection of the rights and freedoms of others.²²⁹ However, under IHRL, the list of what may constitute a legitimate aim for resorting to the criminal law, at least in as much as it may limit the scope of a protected right, is not open-ended and, in fact, it is restricted to the specific grounds mentioned above, and indeed, each of them is, to a large extent, specifically circumscribed.²³⁰ While States may have criminalized certain conduct purporting to pursue one or more of the above-mentioned aims recognized under IHRL, human rights decisions have contributed to clarifying and limiting the specific scope of these purposes.
27. There is an increasing recognition that claims of “[im]morality” alone no longer qualify as a legitimate purpose for criminalizing particular conduct,²³¹ especially in the realm

²²⁸ As Prof. Miller observes, “‘public morals’—operate in complicated ways in local and international law. They constitute a key terrain of formal rights law justification for the limitations of sexual rights, especially restrictions and violations of the expression and conduct rights of persons and groups challenging dominant policies and laws encoding the acceptable, public and private standards of behavior for women and men”, and “UN and regional human rights treaties allow diverse grounds for the regulation of rights relevant to sexuality (national security, rights and freedoms of others, public order/ordre, public health and morals) all of which can and many of which have already been used, formally or informally, as the basis for restricting sexual rights. While our focus is on ‘public morals’ arguments, we need to call attention to times when restrictions based in public health and public order are deployed in service of sexual morality, a practice I will call proxy or ‘sister’ claims to morality. The inter-changeability of claims for restriction suggests the expansive and indivisible scope of claims of respectability and sexual repression in diverse social and legal structures”, in ‘The need to update: the contemporary scope and function of justifiable limits by states, of [sexual] rights in the name of *public morals*. An inquiry into the use of ‘public morals’ justifications in human rights and trade regimes’, draft manuscript on file with the authors.

²²⁹ See International Covenant on Civil and Political Rights. The content of these requirements has been developed extensively elsewhere. See, for example, the Siracusa Principles.

²³⁰ E.g., The Joint Guidelines on Freedom of Association adopted by the European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights stipulate that: “The only legitimate aims recognized by international standards for restrictions are national security or public safety, public order (*ordre public*), the protection of public health or morals and the protection of the rights and freedoms of others. The scope of these legitimate aims shall be narrowly interpreted”, para. 34: *Principle 9: Legality and legitimacy of restrictions*; adopted 14 December 2014 (CDL-AD(2014)046).

²³¹ See *Toonen v Australia*, at para 8.6 (rejecting Tasmania’s argument that ‘moral issues’ were ‘exclusively a matter of domestic concern, as this would open the door to withdrawing from the [Human Rights] Committee’s scrutiny a potentially large number of statutes interfering with privacy’.

of sexuality.²³² Thus, beyond the consensual sexual conduct context, it would seem legitimate to ask whether, in general, mere claims of “[im]morality”, on their own, satisfy IHRL and standards as grounds for criminalizing a particular conduct on their own.²³³ In the context of sexuality, for example, States cannot restrict individuals’ sexual autonomy simply because some people or even a majority of a given public deems their behavior or choices offensive or “immoral”.²³⁴ In its judgment in *Dudgeon v. United Kingdom* some thirty-six years ago, the European Court of Human Rights considered that the criminalization of homosexual activity concerned a most intimate aspect of private life and, in this connection, noted:

*Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved. Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant’s private life to such an extent. “Decriminalisation” does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.*²³⁵

28. Some conduct is criminalized as “immoral” and as an affront to the community, although it cannot be said to cause damage to the community as a whole. This is

²³² See *Naz Foundation*, at para 91; *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Constitutional Court of South Africa, CC 11/98, 9 October 1998, para 37; *Lawrence v Texas*, 539 US 558, 582 (2003) (J. O’Connor, Concurrence); and *Ladlad LGBT Party v Commission on Elections*, Republic of the Philippines Supreme Court, 8 April 2010, 13. However, the ICCPR, at Arts 19, 21, 22, permits the rights to freedom of expression and peaceful assembly and association to be limited for the protection of ‘public morals’; similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms, at Arts 8, 10 and 11, permits the rights to freedom of expression, peaceful assembly and association and the right to respect for private and family life to be limited for the protection of ‘public morals’.

²³³ While human rights law recognizes that States have a legitimate interest in promoting public security, safety or order, public health, morals, or the protection of the rights and freedoms of others, (Siracusa Principles, at paras 27-28) the Siracusa Principles affirm, however, that States’ ‘margin of discretion,’ as it relates to morality, does not apply to the principle of non-discrimination as defined under the ICCPR.

²³⁴ See *Naz Foundation*, at para 91 (‘Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for [a legal] classification’); *National Coalition for Gay and Lesbian Equality*, at para 37 (confirming that asserted ‘public morality’ is nothing more than a mask for an insidious form of prejudice, yet claimed as ‘tradition’; *Lawrence v Texas*, at 582-83 (J. O’Connor, Concurrence) (“Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”) (citations in the original omitted); and *Ladlad LGBT Party v Commission on Elections*, at 13 (‘[M]oral disapproval of an unpopular minority—is not a legitimate state interest that is sufficient to satisfy rational basis review under the equal protection clause.’); see also ‘Nation Behind Bars: A Human Rights Solution’, at 6.

²³⁵ *Dudgeon v. United Kingdom*, no. 7525/76, 22 October 1981, paras. 60-61.

true, for example, of crimes having in differing degrees a religious aspect to them,²³⁶ in the sense that they are at inception found in one religious text/precept or another, e.g., the criminalization of “blasphemy”, attempted suicide, adultery and “fornication” and abortion. In this context, while “[im]morality” claims may be a possible lawful basis for restricting the right to freedom of association, for example, IHRL requires that any such restriction be strictly construed, and that, in any event, any restriction imposed on “[im]morality” grounds will not be regarded as compatible with IHRL where it is inconsistent with other protected rights and, in particular, entails arguably prohibited discrimination, e.g., on grounds such as gender, gender expression, gender identity, sexual orientation. In addition, as mentioned above, claims of “[im]morality” alone no longer qualify as a legitimate purpose for criminalizing particular conduct, especially in the realm of sexuality.

29. The Constitutional Court of South Africa, in *National Coalition v. for Gay and Lesbian Equality and Another v Minister of Justice and Others*, addressing the criminalization of an entire sector of the population in South Africa, resulting from the so-called anti-sodomy provisions, held that criminalizing a particular conduct exclusively based on “the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose.”²³⁷ Indeed, the fact that a certain conduct is merely “immoral” or exclusively harms the accused is ordinarily insufficient to justify a criminal conviction. Lord Hobhouse in *Hinks* said, “an essential function of the criminal law is to define the boundary between what conduct is criminal and what merely immoral.”²³⁸

Necessity

30. There is an increasing awareness that use of criminal sanctions is not the only way to promote public welfare.²³⁹ Where criminalization is used as means to limit

²³⁶ The Kenyan High Court in *Eric Gitari v NGO Board*, affirmed that personal moral and religious beliefs (even if widespread) are no proper basis for the limitation of fundamental rights: “[N]o matter how strongly held moral and religious beliefs may be, they cannot be a basis for limiting rights... To cite religious beliefs as a basis for imposing limitations on human rights would fly in the face of Article 32 of the Constitution [which provides for the right to freedom of conscience, religion, thought belief and opinion]. Freedom of religion... encompasses the right not to subscribe to any religious beliefs, and not to have the religious beliefs of others imposed on one”. See also UN Human Rights Committee, *Fedotova v. Russia*, Communication No. 1932/2010, CCPR/C/106/D/1932/2010, 19 November 2012, paras 10.5-10.6. In addition, as Jamie Todd-Gher observes, values, such as ‘community morality’, are not static – but reflect conceptions, beliefs and associated actions that change over time as communities and individuals do.

²³⁷ Ackermann J, *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Constitutional Court of South Africa, CC 11/98, 9 October 1998, para. 37; see also, other cases cited at footnote 33, Amnesty International, Body Politics.

²³⁸ *R v Hinks* [2000] UKHL 53.

²³⁹ As Jamie Todd-Gher observes, those who support the criminalization of abortion and the overly broad criminalization of HIV exposure, transmission and non-disclosure often assert that such punitive measures are necessary to safeguard women’s health and best interests. However, in the abortion context, evidence-based approaches demonstrate that criminal provisions result in persecution, stigma and denial of services for women and girls, and stand in the way of patients’ privacy, physicians’ ability to practise medicine and States’ IHRL obligations to improve health outcomes. Similarly, in the HIV criminalization context, laws purporting to ‘protect women’ can have a disproportionate impact on them and be enforced against women

protected rights, it must not be merely proportionate (see below), but also strictly necessary. Under the requirement of necessity, resort to criminal law may only be justified when other legal responses would be inadequate, the conduct would otherwise deserve penal sanction, and criminalization is necessary to fulfill the goals of deterrence, incapacitation, and rehabilitation. Notably, many social issues can be effectively managed at the community level, although it should be acknowledged that there is a need for caution as diversion from the criminal justice system may result in minimizing and detracting attention from serious human rights abuses, such as violence against women and girls, and violate, in turn, the rights of victims of crimes to access to justice, remedies and redress, under IHRL. Having said that, in addition to civil and administrative regulation, States can pursue other means to address the root causes of social misconduct, enhancing public education, problematic substance use and mental health treatment, and promoting systems of positive reinforcement and reward. In other words, criminal law is just one tool States can use to prevent harm, protect the public and promote public health. Thus, when read in conjunction with the principle of *ultima ratio*, the principle of necessity means that States should only resort to criminal law if no non-punitive measures suffice.²⁴⁰

Proportionality

31. Even when States can demonstrate that there is a legitimate purpose for criminalizing a particular act or omission, and resort to criminal law is necessary — penalizing as a matter of law, and setting a particular punishment — criminal law enforcement is nonetheless further limited by the proportionality principle. This principle requires that State policies, including in the realm of criminal laws, must be proportionate and suitable to pursue the legitimate aim pursued. This means that the criminal law should not be used where other non-punitive measures would better achieve the same aim. Moreover, a State's choice of sanction must reflect the seriousness of the misconduct, and the culpability of the person, as compared to other crimes.²⁴¹ In other words, the offense charged and an individual's blameworthiness should be no greater than necessary.²⁴² As criminal penalties are society's highest level of sanction, they should only be imposed for serious misconduct and potential or actual harm. Additionally, criminal punishment should only be meted for actual misconduct.²⁴³

to the detriment of their health and lives. Evidence thus shows that far from being necessary for the protection of women and girls, criminalization is both unnecessary and counterproductive.

²⁴⁰ The Siracusa Principles require that a State's limitation or restriction on human rights be proportionate and no more restrictive than necessary. See Siracusa Principles, paras 10-14; the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, at paras 60-61. See, UN Commission on Human Rights, Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), 8 January 1987, E/CN.4/1987/17.

²⁴¹ See D Husak *Overcriminalization: The Limits of Criminal Law* (2008) 28; see generally Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, UN Doc. A/Conf.144/28/Rev.1, Res. 1(a), 5(c) (1990) (punishments imposed upon conviction following a fair trial must be proportionate to the gravity of the crime and the circumstances of the offender).

²⁴² See 'Nation Behind Bars: A Human Rights Solution', at 7.

²⁴³ For example, the Beijing Rules prohibit punishing adolescents for acts that would not be criminal if carried out by an adult. See United Nations Standard Minimum Rules for the Administration of Juvenile

32. Another facet of proportionality is the notion of reasonableness – albeit it is also the case that its consideration may be subsumed, and determined, when assessing criminal law compliance with other principles, especially necessity and non-discrimination. However, for ease of reference and consistent with the case-law cited below, reasonableness is addressed here. The use of criminal law and its impact must also be reasonable. If criminalizing an activity causes more harm to national security, public order, safety, public health or the protection of the rights and freedoms of others, than good, then it is arguably unreasonable.²⁴⁴ For example, highly punitive laws on abortion do not reduce the number of abortions taking place in a given context, but do increase the likelihood that such abortions will be carried out clandestinely, and in an unsafe manner, at great risk to the health and life of the concerned women and girls. Highly restrictive laws, which only permit abortion in very limited circumstances or not at all, also can create an atmosphere of suspicion whereby women and girls may be accused of having undergone an abortion even when they have actually suffered a miscarriage.²⁴⁵ The impact of these laws in terms of jeopardizing women’s health and lives, and even imprisoning women for having a miscarriage, causes considerably more harm, than any purported benefit, and thus could be understood as highly unreasonable.

33. For example, the Brazilian Supreme Court has held that the criminalization of “voluntary termination of pregnancy carried out in the first trimester”, in addition to violating several human rights of women, violated:

*the principle of proportionality for reasons that are cumulative: (i) it is likely not adequate to protect the intended legal good (the life of the unborn), because it has no relevant impact on the number of abortions performed nationwide, and serves only to impede their safe practice; (ii) it is possible for the State to avoid the occurrence of abortions through more effective and less harmful measures than criminalization, such as sexual education, distribution of contraceptives, and support for the woman who wishes to carry the pregnancy to term but finds herself in adverse conditions; (iii) the measure is disproportionate in the narrow sense, as it produces social harms (problems with public health and deaths) that clearly outweigh its benefits.*²⁴⁶

Equality and Non-discrimination

Justice (The Beijing Rules), G.A. 96th Plenary Meeting, 29 November 1985, UN Doc. A/RES/40/33, rule 3.1; United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), G.A. 68th Plenary Meeting, 14 December 1990, UN Doc. A/RES/45/112, Art 56.

²⁴⁴ See, for example, Human Rights Committee, General Comment 25 (Participation in Public Affairs and the Right to Vote), 27 August 1996, UN Doc. CCPR/C/21/Rev.1/Add.7, paras 4-19 (analysing ‘reasonableness’ in the context of restrictions on voting rights); Human Rights Committee, 102nd Sess., 12 September 2011, UN Doc. CCPR/C/GC/34, paras 19, 39 (discussing ‘reasonable’ restrictions in the context of access to information and State regulation of mass media).

²⁴⁵ See ‘Marginalized, Persecuted, and Imprisoned’, at 11, 25-26.

²⁴⁶ See, the English version of this opinion was edited by Sara Huddleston and revised by Professor Paulo Barrozo, Associate Professor at Boston College Law School. Brazilian Supreme Court, Writ of Habeas Corpus, 124.306 Rio de Janeiro State, Majority Opinion, available at <http://www.iconnectblog.com/wp-content/uploads/2017/03/Brazilian-Abortion-Ruling-Translation.pdf>, para. 6.

34. States' criminal justice powers are limited by the principles of equality and non-discrimination. One component of equality is the right to be treated equally under the law and to enjoy "equal protection" of the law without discrimination. Criminal provisions that are solely based on animus towards a particular individual or group on grounds of "[im]morality" or otherwise, fail to satisfy the legitimate purpose and proportionality/reasonableness requirements, as discussed earlier.²⁴⁷
35. In light of this, the principle of non-discrimination and the rights to equality before the law and equal protection of the law without discrimination count against "[im]morality" justifications for criminal sanctions. Simply seeking to sanction a particular unpopular group, or conduct closely associated with that group, through the criminal law directly contravenes the right to be treated equally under the law, and therefore should not be recognized as a legitimate State interest.²⁴⁸ This type of analysis is particularly salient in the realms of sexuality and reproduction where States often justify criminalizing sexual and reproductive actions and decisions as a means to promoting a particular conception of "cultural morality," or punishing specific expressions of gender and sexuality that do not conform to strict gender norms that are most often discriminatory.
36. Arguably, there should be a distinction between, on the one hand, "private morality", individual ethics and principles and, on the other, "constitutional morality", namely, fundamental civic principles generally memorialized within State constitutions synthesizing a broader range of views for just, fair and open democracies, however diverse societies are.²⁴⁹ In addition, the fact that IHRL requires States to take specific protective measures for those who are marginalized and/or at greater risk,²⁵⁰ would suggest that States cannot restrict individuals' sexual autonomy simply because some people or even a majority of the public deems their behavior or choices offensive or "immoral". Challenges to the criminal law based on non-discrimination and equality before the law may be articulated against both substantive criminal law — e.g. the criminalization of adultery, "fornication", consensual sexual activity, etc. in the sense that the penal provisions are discriminatory on their face — or against the discriminatory application of laws that are not facially discriminatory, or on both of these grounds.

²⁴⁷ Moreover, criminal laws and policies must be applied equally to all people and must not have a discriminatory impact on particular groups of people. These requirements are not met, for example, when women are more likely to be prosecuted for adultery than men, and are furthermore denied their right to mount an adequate defense because in some contexts, their testimony is worth only half that of a male accuser. See Siracusa Principles, at paras 9, 28; Limburg Principles, at paras 35-41, 49; Amnesty International, 'Iran: End Deaths by Stoning' (2008) 6.

²⁴⁸ See *Romer v Evans*, 517 US 620, 633 (1996) (considering the constitutionality of a State constitutional amendment that prohibited all legislative, executive or judicial action intended to protect people on the basis of their 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.')

²⁴⁹ See R Duff, L Farmer, S Marshall, M Renzo and V Thomas 'Introduction: Towards a Theory of Criminalization?' 16; Naz discussing the concept of 'constitutional morality'; *National Coalition for Gay and Lesbian Equality* at para 136, discussing the concept of 'political morality'.

²⁵⁰ See, e.g. General Comments 14 and 22 of the Committee on Economic, Social and Cultural Rights.

37. The criminalization of sexual and reproductive health services that only women need, such as abortion, is a form of discrimination against women.²⁵¹ For example, in a 2006 case from the Constitutional Court of Colombia, overturning Colombia's absolute ban on abortion, the Court relied on the CEDAW Convention to call "*for the elimination of all forms of gender discrimination that stereotype women into child-bearing service roles, inhibiting their ability to make free and informed decisions as to whether and when to found a family.*"²⁵² Specifically, the Court recognized that women cannot be "*treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.*"²⁵³ It further challenged the discriminatory treatment that essentializes women as mothers and deprives them of agency in making decisions about their reproductive capacity:

*The right to be a mother, or in other words, the right to opt for motherhood as a "life choice," is a decision of the utmost private nature for each woman. ... Therefore, the Constitution does not permit the state, the family, the employer or educational institutions to introduce any regulation or policy that infringes upon the right of a woman to choose to be a mother or that interferes with the rightful exercise of motherhood. Any discriminatory or unfavorable treatment of a woman on the basis of special circumstances she might be facing at the time of making the decision of whether to be a mother (for example, at an early age, within marriage or not, with a partner or without one, while working, etc.) is a flagrant violation of the constitutional right to the free development of the individual.*²⁵⁴

38. Principles of equality and non-discrimination are also violated when LGBTI people are explicitly targeted by laws criminalizing consensual same-sex conduct. While laws that criminalize consensual sex raise numerous human rights concerns, including with respect to the rights to self-determination, privacy, health, they may also give rise to additional concerns in terms of how they are enforced against particular groups in a discriminatory manner. For instance, trans people are disproportionately impacted by the criminalization of consensual adult sex work,²⁵⁵ and women are disproportionately detrimentally affected by law criminalizing adultery – in both cases often regardless of whether the individual has actually engaged in the prohibited conduct. However, it is important to distinguish between criminal provisions that are on their face discriminatory on prohibited grounds – and therefore may *per se* contravene legal principles derived from substantive criminal law and IHRL – and criminal laws that are used in a discriminatory fashion. In this vein, discrimination occurs within the criminal justice sector when courts accept biased, incorrect or misinterpreted medical or scientific evidence, which is common in

²⁵¹ CEDAW GR 24; see also *Mellet v Ireland*, Human Rights Committee, concurring opinions of Cleveland, Rodrigues, Salvioli and DeFrouville, and Ben Achour.

²⁵² Women's Link Worldwide, 'C-355/2005: Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia' (2007), 9.

²⁵³ Women's Link Worldwide, 'C-355/2005: Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia' (2007), 36.

²⁵⁴ Women's Link Worldwide, 'C-355/2005: Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia' (2007).

²⁵⁵ See generally 'Making Love a Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa', Amnesty International; 'Stonewalled: Policy Abuse and Misconduct against Lesbian, Gay, Bisexual and Transgender People in the US', Human Rights Watch.

prosecutions for abortion, HIV transmission, exposure or non-disclosure,²⁵⁶ and risk behavior during pregnancy.²⁵⁷ While it may be legitimate for States to criminalize a certain conduct that, for example, threatens or carries a significant risk to public health, criminalization should always be evidence-based and non-discriminatory.²⁵⁸

39. In *Naz Foundation v. Govt. of NCT of Delhi*, the High Court of Delhi found a 19th century colonial era law criminalizing consensual same-sex sexual activity between adults unconstitutional.²⁵⁹ It reasoned that the law was rooted in harmful stereotypes of gay and lesbians being deviant and perverse and underscored the resulting stigma and prejudice associated with stereotypes which view a whole group of people as criminal:

*“When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population, is because of its sexual nonconformity, persecuted, marginalized and turned on itself.”*²⁶⁰

40. In summarizing its decision, the Delhi High Court stressed the importance of upholding the values of equality, tolerance and inclusiveness in society, not ostracizing persons based on stereotypes:

*If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised.”*²⁶¹

²⁵⁶ “The criminal law should treat HIV like every other disease under the criminal law. To create a special law for HIV that doesn’t require that the person intend any harm or even pose a serious risk of harm is discrimination based on that person’s health status”, ‘Consensus Statement on HIV “Treatment as Prevention” in Criminal Law Reform’, ‘Frequently Asked Questions’, ‘10. SO WHAT ARE SOME EFFECTIVE TALKING POINTS FOR MODERNIZING HIV CRIMINAL LAWS?’, p. 6, on file with the authors; see, also, ‘Rights, Risk and Health’, at 20-25; see also David Gurnham, *Criminalising Contagion: Ethical, Legal and Clinical Challenges of Prosecuting the Spread of Disease and Sexually Transmitted Infections*, 89 SEXUALLY TRANSMITTED INFECTIONS 4 (2013).

²⁵⁷ See ‘Arrests and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health’.

²⁵⁸ Amnesty International, *Body Politics*, p. 45.

²⁵⁹ *Naz Foundation v. Government of NCT of Delhi*, Decision of 2 July 2009, WP (C) No. 7455/2001 (India, High Court of Delhi at New Delhi), para. 92.

²⁶⁰ *Naz Foundation v. Government of NCT of Delhi*, Decision of 2 July 2009, WP (C) No. 7455/2001 (High Court of Delhi at New Delhi), para. 94.

²⁶¹ *Naz Foundation v. Government of NCT of Delhi*, Decision of 2 July 2009, WP (C) No. 7455/2001 (India, High Court of Delhi at New Delhi), para. 130.

Conclusion

41. Based on IHRL and substantive criminal law notions, this paper has sought to explore and set out propositions with a view to their eventual elaboration into a set of principles to address the overly broad criminalization of HIV exposure, transmission and non-disclosure, and the criminalization of consensual sexual conduct, reproduction and personal drug use. The principles to be eventually elaborated should help both in the development of new criminal legislation, and in reviewing existing criminal provisions, and help mitigate the detrimental impact of criminalization on health, equality and human rights in the above-mentioned contexts and beyond.